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Who is to Guard the Guardians Themselves? Russia's Invasion of Ukraine, Racism and Transitional Justice

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WHO IS TO GUARD THE GUARDIANS THEMSELVES? RUSSIA'S INVASION OF UKRAINE, RACISM AND TRANSITIONAL JUSTICE

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Abstract

This Article investigates the deep-rooted connection between racism and the development of international law, emphasizing its enduring influence on Transitional Justice. The normatization of international law and its instrumentation by imperial actors in pursuit of their interests have perpetuated systemic racism. The war in Ukraine is a poignant illustration of conflicts as arenas for imperial supremacy, racism, accountability failures, and the struggle for transitional justice—in the face of ever-expanding imperial aspirations.

Thus, the unresolved question of who guards the guardians themselves looms, particularly in light of Russia's involvement as a permanent United Nations Security Council member. Racism often manifests as power imbalance and a lack of accountability through Transitional Justice. Drawing on Critical Race Theory and Third World Approaches to International Law, this Article proposes that these frameworks offer valuable tools for comprehending the hegemonic orders perpetuating racism, subordination, and transitional (in)justice.

Accordingly, dismantling the racial underpinnings that persist within international law and transitional justice makes fostering a more inclusive, equitable, and just international society possible.

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I. Introduction

Transitional Justice is articulated and narrated as a set of judicial and non-judicial measures for accountability and remediation of mass human rights violations, reparation, restoration, (re)affirmation of just public order, and prevention of repetition in the aftermath of conflicts or authoritarian regimes.[1] Transitional Justice is also about foresight, imagination, and proactive justice. Institutions and societies can respond to threats to human rights, such as conflicts, by timely and tailored (re)imagination and reform of institutions and practices, thus dismantling those foundations that bolster impunity and encourage violence against others, such as racism.[2]

This is vital because racism in Transitional Justice is not unique to the (sub) discipline.[3] Rather, racism in Transitional Justice is an iteration of racism in International Law.[4] To dismantle racism in Transitional Justice, scholars must see these tangles between International Law and racism—which have continued to morph and shape the times and branches of the law.[5]

Unearthing racism is crucial because racism in transitional justice is both a backward and forward phenomenon—a swinging rapier that marks the temporal

[1] *See generally* STEPHAN PARMENTIER, *Transitional Justice*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 53 (William A. Schabas ed., 2016); Colleen Murphy, *Introduction*, *in* THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 1–37 (2017); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003); RUTI G. TEITEL, TRANSITIONAL JUSTICE 3-30 (2000); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275 (2008); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 762 (2003).

[2] On racism, *see* The United Nations Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N.T.S 660, 9464 (Dec. 21, 1965).

[3] *See* U.N. GAOR, 72nd Sess., 73rd plen. mtg. at 2, U.N. Doc. A/72/157 (Jan 25, 2018) (expressing alarm at the spread in many parts of the world many racist extremist movements promoting right wing agendas, racial supremacist views, violence and intolerance against migrants and refugees).

[4] Hugo Van der Merwe & M. Brinton Lykes, *Racism and Transitional Justice*, 14 INT'L J. TRANSITIONAL JUSTICE 415, 416 (2020); *see* U.N. GAOR, 77th Sess., U.N. Doc A/72/512 (Oct. 7, 2022) (discussing contemporary forms of racism, racial discrimination and related intolerance of 7 October 2022; also recognizes the glorification of Nazism, and continued cooptation of young people into extremist organizations such as Neo-Nazi groups).

[5] *See* The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration and Programme of Action*, (Sep. 8, 2001) (acknowledged among other things the long history of racism as manifested in slavery, and slave trade—especially the transatlantic slave trade).

dimensions of the experiences of racialized communities and peoples around the world.[6] Racism is an ever-present problem because although the human cohabitation of the earth across cultures, times, and climes is given, the existence of ideologies of domination has often created avenues of alienation and violence.[7]

Racism is also backward in providing easy foundations of inferiorization—to justify previous violence and sow the seeds of future violence.[8] Racism is also mutant and coopts other forms of prejudices such as Nazism, antisemitism, and violent nationalism in service of its inherently discriminating goals.[9] It is forward because it consolidates the *othering* and consequent violations through acts of violence, cycles of violence, theories of inferiority, silencing, and total domination. This can be done by ensuring that vulnerable populations and communities are overawed or exterminated so that no one is left to tell the story.[10]

At other times, those who survive are forever silenced out of fear: "*The casualties are not only those who are dead, they are well out of it, [. . .].*"[11] By so doing, the narratives and memories of violence are preempted so that what is remembered, or the memories of the atrocities are colored to suit the interests of the conquering power. This robs the living by ensuring nonrecognition, remediation, reparation, and restoration. It also inspires impunity. The enduring temporal and inter-temporal significance of these can be dispositive. Over time, the story of the victims could become mere footnotes—if not complete erasures—on the vast narrative of international law.[12]

I contend so because international law's structures, encounters, and narratives have often been about racial othering and consequent violations. Sometimes, these violations are deemed proper for the "civilization" and "development" of

[6] E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. 378, 378 (2021) (using George Floyd's case to illustrate racism's transnational dimensions).

[7] Michael Gorup, *The Strange Fruit of the Tree of Liberty: Lynch Law and Popular Sovereignty in the United States*, 18 PERSP. POL. 819, 827 (2020) (exploring how spectacle lynching played a role in constituting the racialized public sphere and affirming who was sovereign, and who was the subordinate in that public order).

[8] United Nations Education and Scientific Organization (UNESCO), Declaration on Race and Racial Prejudice, art. 2 (Nov. 27, 1978) (noting that "racism includes racist ideologies, prejudices, attitudes, discriminatory behavior, structural arrangements, and institutional practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable;" it also noted with the gravest concern the ever-changing forms of racism and racial prejudice).

[9] On new forms of racism, *see* Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, Oct. 7, 2022 (combating glorification of Nazism, neo-Nazism and other practices that contribute to fueling contemporary forms of racism, racial discrimination, xenophobia and related intolerance).

[10] *See generally* ALISON DES FORGES, LEAVE NO ONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999).

[11] JOHN PEPPER CLARKE, THE CASUALTIES (1970) (on the Biafran war (Nigeria) 1967-1970 and the consequences of the war); Syl Cheyney-Coker, *Visions and Reflections on War: Book Review Casualties: Poems 1966/68 by John Pepper Clarke*, 1 UFAHAMU: J. AFR. STUD. 93, 97 (1971).

[12] Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 832-33 (2000) (on the prevalence of racism in international law and how the discourse is often avoided).

the victims.[13] This is the source of racism in Transitional Justice.[14] At other times racism is embedded in the hierarchies and relationships formed in international law and its effect on the dynamics of international relations. Many scholars of the global South continue to explore the theme of racism, although doctrinal international law often peripheralizes, if not wholly avoids, the discussion of race.[15]

To overcome racism in transitional justice, we must engage these grounds of racialized encounters in international law. This is vital because when imperial powers and interests are implicated, accountability and transitional justice become almost impossible.[16] This can be seen in international law and the domestic sphere with violent law enforcement against Blacks and minorities—and how that often escapes reckoning.[17]

Imperial powers ignore our protestations because they deem themselves the guarantors of international order. Scholars sometimes enable these imperial dispositions by emphasizing "the clash of civilizations" and the easy resort to unilateral use of force in international law.[18] The powers of the members of the United Nations Security Council (UNSC-P5) consolidate this commitment to a presidium that is answerable only to itself, either as a composite entity or to themselves individually: so *"who is to guard the Guardians themselves [...] in crime, complicity guarantees silence."*[19] Such plenary powers, when misused, can cause significant harm to communities and peoples, as is currently the case in Ukraine.

Thus, on February 24, 2022, when Russia commenced a new phase of the war against Ukraine, it was advancing an imperial pursuit and, at the same time, justifying it with rhetoric of otherness, superiority, and a claim of the right of

[13] Christopher Szabla, *Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900*, 25 J. HIST. INT'L L. 70, 73-74 (2023); *see generally* Ntina Tzouvala, *The Standard of Civilisation in International Law: Politics, Theory, Method*, *in* CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (2020); Robert Knox, *Civilizing Interventions? Race, War, and International Law*, 26 CAMB. REV. INT'L AFF. 111, 116 (2013).

[14] Mutua explores the contradictions in human rights discourse framed along the savage-victim-savior triage. *See* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 224 (2001).

[15] James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 CHI J. INT'L L. 71, 93-94 (2021) (showing the different issues regarding the avoidance of race in international law scholarship within the American Society of International Law publications).

[16] *See* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 3, 24, 42 (2011).

[17] For instance, the death of George Floyd opened up a debate in international and domestic law on racist law enforcement. *See* Virgine Ladisch & Anna Myriam Roccatello, *The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States*, ICTJ Briefing (April 2021).

[18] SAMUEL HUNTINGTON, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 22-32 (June 1, 1993).

[19] Juvenal, *Satire VI*, lines 347-348 (A. S. Kline trans.) (2011). The concept of the 'sacred trust of civilization' is enshrined in the foundations of the Mandate System under the League of Nations. Its vestiges are found in the Trusteeship System of the United Nations. *See generally* Charles H. Alexandrowicz, *The Juridical Expression of the Sacred Trust of Civilization*, 65 AM. J. INT'L L. 149, 157 (1971); *see generally* Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of the Trusteeship*, 9 MAX PLANCK Y.B. U.N. L. 47 (2005); C. L. UPTHEGROVE, EMPIRE BY MANDATE 16-17 (1954); *see generally* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL'Y 513 (2002).

conquest and domination.[20] The war has been condemned by many countries of the United Nations (UN)[21] and other international and regional organizations such as the European Union (EU)[22] and the North Atlantic Treaty Organization

[20] Eleanor Watson, *100 days of War in Ukraine: A Timeline*, CBS NEWS (June 3, 2022), https://www.cbsnews.com/news/ukraine-russia-war-timeline-100-days/; Jane Clinton, *Russian-Ukraine War at A Glance: What we Know on day 283 of the Invasion*, THE GUARDIAN (Dec. 3, 2022), https://www.theguardian.com/world/2022/dec/03/russia-ukraine-war-at-a-glance-what-we-know-on-day-283-of-the-invasion; Matthew Mpoke Bigg et. al, N.Y. TIMES (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/world/europe/ukraine-russia-war-kherson.html; Helen Cooper et al., *Winter Will be a Major Factor in the Ukraine War, Officials Say,* N.Y. TIMES (Nov. 12, 2022), https://www.nytimes.com/2022/11/12/us/politics/winter-ukraine-russia-war.html; Masha Gessen, *The War in Ukraine Launches a New Battle for the Russian Soul*, NEW YORKER (Oct. 17, 2022), https://www.newyorker.com/magazine/2022/10/17/the-war-in-ukraine-launches-a-new-battle-for-the-russian-soul; Timothy Snyder, *Essay: The War in Ukraine is a Colonial War*, NEW YORKER (Apr. 28, 2022), https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war; Yuliya Talmazan, *Russian Missiles Knock-out most of Kyiv Water Supply*, NBC NEWS (Oct. 31, 2022), https://www.nbcnews.com/news/world/russian-strikes-hit-key-ukrainian-infrastructure-kyiv-black-sea-rcna54761.

[21] *See* U.N. GAOR, 11th Sess., 1st plen. Mtg at 3, U.N. Doc. A/ES-11/L/1 (2022). The resolution amongst other things:
"Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters; 2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter; 3. Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State; [...]."
Julian Borger, *UN Votes to Condemn Russia's Invasion of Ukraine and Calls for Withdrawal*, THE GUARDIAN (Mar. 2, 2022), https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote (141 Members of the 193 member UN states voted for the resolution. 35 Members abstained, and five states voted against. Eritrea, Belarus, Syria and North Korea voted in favor of Russia). Post-World War II reparative measures against Germany are cases in point. There is also the case of Post-World War I against Germany as captured by the Treaty of Versailles. *See* Randall Lassaffer, *Aggression Before Versailles,* 29 EUR. J. INT'L L. 773, 789-97 (2018) (highlighting the history of aggression before World War I); *see Article 10 of the Covenant of the League of Nations* 1919, 13 AM. J. INT'L L. SUPP. 128, 131-32 (1919). These have great ramifications for international accountability in the situation in Ukraine. *See London Charter of the International Military Tribunal, London* (Aug. 8, 1945); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., U.N. Doc 2625 (XXV) (Oct. 24, 1970); *see generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States of America), Merits, Judgement, I.C.J. Rep. 14 (June 27, 1986) [hereinafter The Nicaragua Case] (discussing the subject of aggression); Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005, I.C.J. Rep. 168 (Dec. 19) (on aggression and the constituting elements); Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 239 (1977); Elizbeth Wilmshurst, *Definition of Aggression*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008) (exploring the development of the concept of aggression and the series of International Law Commission's efforts and other negotiations to come to a generally accepted definition of aggression); *see generally* Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179 (2010) (highlighting the development of the doctrine of aggression under the Rome Statute of the International Criminal Court (ICC). But the ICC relies on complementarity and the voluntary submission of states to the jurisdiction of the International Criminal Court by accession to the Rome statute. United Nations Security Council has referred situations such as Darfur to the ICC, but this is unlikely to happen with Russia considering the breakdown in the UNSC whenever it involves a permanent UNSC member. *See* U.N. SCOR, 5158th mtg., U.N. Doc. S/Res 1593 (Mar. 13, 2005) (made pursuant to the report of the International Commission of Inquiry on violations of International humanitarian Law and human rights in Darfur *S/2005/60* and referring the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court).

[22] Eur. Consult. Ass., *Russia's Military Aggression against Ukraine: EU Imposes Sanctions Against President Putin and Foreign Minister Lavrov and Adopts Wide Ranging Individual and Economic Sanctions*, Press Release (Feb. 25, 2022); Eur. Consult. Ass., *G7 Leaders Statement on the Invasion of Ukraine by Armed Forces of the Russian Federation*, Press Release (Feb. 24, 2022); Eur. Consult. Ass., *Ukraine: Declaration by the High Representative on Behalf of the European Union on the Invasion of Ukraine by Armed Forces of the Russian Federation*, Press Release (Feb. 24, 2022); Eur. Consult. Ass., *Council of Europe Adopts Package of Sanctions in Response to Russian Recognition of the Non-government*

(NATO).[23] Equally, an action has been commenced at the International Court of Justice (ICJ) seeking to hold Russia responsible.[24]

The International Criminal Court (ICC) has also followed up on aspects of the problem with an indictment of Putin. Yet, the question remains whether there would be more significant transitional justice accountability and what that may look like.[25] Would it be a Nuremberg-styled Tribunal or a Truth Commission in Kyiv? These questions are crucial in understanding the (im)possibilities of accountability when a member of the United Nations Security Council or other big powers violates international law.[26] Nonetheless, UN resolutions on the war in Ukraine are crucial in analyzing the ongoing iteration of the belligerency between Russia and Ukraine on many grounds.

Three grounds are essential to our discourse. First, the United Nations General Assembly (UNGA) framed its resolutions as aggression against Ukraine. This means that the UNGA has identified a *prima facie* situation of a war of aggression, implicating Russia's state responsibility in international law. Having been so identified, the war and postwar accountability measures relevant to a war of aggression have also been implicated. At the minimum, a Nuremberg-styled Tribunal, or as we saw in the Yugoslav War Crimes Tribunal, is essential to any post-conflict accountability mechanism.

Second, International Criminal Court measures can be issued against leaders and other key players in the War. In many respects, the issues involved are questions of universal jurisdiction. States may, therefore, use available resources within their sovereign powers to pursue accountability. Finally, situations of aggression require reparative accountability and have been exerted in similar circumstances in international law.[27]

Controlled Areas of the Donetsk and Luhansk Oblasts of Ukraine and Sending Troops into the Region, Press Release, (Feb. 23, 2022).

[23] *NATO Condemns Russia's 'Illegal Land Grab'*, DW NEWS (Sept. 30, 2022), https://www.dw.com/en/nato-condemns-russias-illegal-annexation-of-ukrainian-territories/a-63301828.

[24] The war has also become central in the Application filed by Ukraine before the ICJ alleging that Russia is engaged in a "campaign to erase the distinct culture of ethnic Ukrainian and Tatar people in Crimea." *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgement, I.C.J., ¶ 5 -6 (Nov. 8, 2019); Julian Borger, *United Nations International Court of Justice Orders Russia to halt Invasion of Ukraine*, THE GUARDIAN (Mar. 16, 2022), https://www.theguardian.com/world/2022/mar/16/un-international-court-of-justice-orders-russia-to-halt-invasion-of-ukraine; Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Preliminary Objection, 2023/45 I.C.J (Aug. 22, 2023) (filed at the Registry of the International Court of Justice, February 26, 2022).

[25] On doctrinal considerations and guiding norms regarding responsibility and accountability for the Russian invasion of Ukraine, *see* Tom Dannenbaum, *Accountability for Aggression, Atrocity, Attributability, the Legal Order and Sanitized Violence*, MD. J. INT'L L. (forthcoming 2023) (manuscript at 7-8), https://ssrn.com/abstract=4395834.

[26] From Vietnam, to Nicaragua, and East Timor, holding imperial states and their allies to account for human rights violations has been difficult for international law.

[27] On the legacy of Nuremberg and accountability, *see* Henry T. King Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT'L L. 335, 336 (2002). The United Nations General Assembly (UNGA) resolution A/ES-11/L. 1 of March 1, 2022, drew attention to the contents of resolution 3314 (XXI) of 14 December 1974 on aggression which articulated aggression as the use of armed force against the territorial integrity of or political independence of another state or in any other manner inconsistent with the Charter of the United Nations. U.N. GAOR 3314 (XXIX) Dec. 14, 1974, art. 1-2 provides that:

Still, we should recall that this phase of the war in Ukraine is an extension of the belligerence between the two countries since 2014 when Russia annexed Crimea and subsequently claimed and occupied other Ukrainian territories.[28] These claims of Russia have been faulted by scholars and policy institutions, as attested to by the UN resolutions on the war in Ukraine and previous resolutions focusing on Crimea. Regardless, Russia continued and maneuvered a referendum to consolidate the Crimean annexation from Ukraine as a case of self-determination.[29]

The damages and costs of wars to humanity and international law have not been fully articulated.[30] Like other wars, the conflict in Ukraine has a high destructive capacity. Wars alter destinies and sometimes eliminate entire communities.[31] The more difficult aspect, though, has been the ambivalence of international legal operators towards a deracialized international law and order.[32] In other words, racism has endured in international law and order.[33] Certain peoples have often been viewed as inferior; thus, their conquest and domination is a natural cause

"Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the charter of the United Nations [article 1]. The first use of armed force by a state shall constitute prima-facie evidence of an act of aggression although the security council may in conformity with the charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that acts concerned, or their consequences are not of sufficient gravity [article 2]."

[28] *See* Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT'L L. 68, 72 (2015) (the annexation bears the hallmarks of colonial annexation); U.N. GAOR, 68th Sess., plen mtg.80, U.N. DOC 68/262, Apr. 1, 2014 (100 states voted in favor of Ukraine, condemning the annexation and affirming the sovereign territorial integrity of Ukraine including Crimea); Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 GER. L.J. 581, 581 (2015); PAUL D'ANIERI, *The Sources of Conflict over Ukraine*, *in* UKRAINE AND RUSSIA: FROM CIVILIZED DIVORCE TO UNCIVIL WAR 26 (2019).

[29] Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GER. L.J. 365, 383 (2015).

[30] *See generally* JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT (2008); Ilan Berman, *The Real Cost of Russia's Ukraine War*, THE HILL (Nov. 30, 2022), https://thehill.com/opinion/international/3756097-real-costs-of-russias-ukraine-war/; Guy Faulconbridge, *Explainer | Blood Treasure and Chaos: The Cost of Russia's War in Ukraine*, REUTERS (Nov. 10, 2022), https://www.reuters.com/world/europe/blood-treasure-chaos-cost-russias-war-ukraine-2022-11-10/; Bianca Pallaro & Alicia Parlapiano, *Four Ways to Understand the 54 billion in US Spending on Ukraine*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/interactive/2022/05/20/upshot/ukraine-us-aid-size.html; Maureen Groppe, *US Aid to Ukraine Could Hit $53B. Here's What it Covers, How it Compares and Who Pays for It*, USA TODAY (May 7, 2022), https://www.usatoday.com/story/news/politics/2022/05/17/ukraine-aid-bill-break-down/9674471002/?gnt-cfr=1.

[31] Martin Luther King, Jr., *The Quest for Peace and Justice*, Nobel Lecture, December 11, 1964 (on the inherent problems associated with war).

[32] Thiago Amparo & Andressa Vieira e Silva, *George Floyd at the UN: Whiteness, International Law and Police Violence*, 7 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 91, 105-109 (2022) (on the often-careful avoidance of the proper discussion of racism in the UN and how that helps keep the structures in place).

[33] Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 UCLA L. REV. 1652, 1663 (2021); W.E.B. (William Edward Burghardt) Du Bois, *The Problem of the 20th Century is the Problem of the Color Line*, PITTSBURGH COURIER, Jan. 14, 1950, at 8-9; W.E.B. Du Bois, *Inter-Racial Implications of the Ethiopian Crises: A Negro View*, 14 FOREIGN AFF. 82, 82-84 (1935) (highlighting racialism in international law and how imperial powers often manufacture convenient reasons for invading and pillaging the racialized other. This has significance for transitional justice since transitional justice often fails to hold these imperial powers to account).

and calling of the principal structures of international law.[34] This is evident in the war in Ukraine now—especially considering the rhetoric of inferiority from Moscow.

The disposition to dominate has inspired many wars of expansion, conquest, and violations of human dignity—which are never reckoned with in transitional justice. This lack of reckoning for historical injustice continues to affect the tenets of transitional justice, especially as it pertains to colonial violations and reparations for historical injustices such as enslavement, lynching, dispossession,

[34] On debate seeking to refocus attention to the racialized nature of international law, its resilience and continuities, *see* Michele Goodwin & Gregory Shaffer, *Colonialism, Capitalism, and Race in International Law: Introduction to Symposium Issue*, 7 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 1, 3-4(2022); Dire Tladi, *Representation, Inequality, Marginalization and International Law-Making: The Case of the International Court of Justice and the International Law Commission*, 7 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 60, 67-68 (2022); José E. Alvarez, *The Case for Reparations for the Color of COVID*, 7 U.C. IRVINE J. INT'L TRANSNAT'L & COMPAR. L. 7, 35 (2022); Ali Hammoudi, *International Order and Racial Capitalism: The Standardization of 'Free Labour' Exploitation in International Law*, 35 LEIDEN J. OF INT'L L. 779, 792 (2022); Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT'L L. 597, 614-15 (2018) (the author uses Haiti and France to demonstrate how the control and management of non-European peoples, territorial acquisitions, and exploitation and commercialization of their natural resources were integral to the legal and social frameworks through which European empires grew and expanded); *see* Holly Ellyatt, *Kessinger Still Lives in the 20th Century: Ukraine Hits Back at Suggestion it Should Cede Land to Russia*, CNBC (May 25, 2022), https://www.cnbc.com/2022/05/25/ukraine-rejects-kissinger-suggestion-it-should-cede-land-to-russia.html; Brad Dress, *Zelensky Rips Kissinger Over Suggestion Ukraine Cede Territory to Russia*, THE HILL (May 25, 2022), https://thehill.com/homenews/3502032-zelensky-rips-kissinger-over-suggestion-ukraine-cede-territory-to-russia/; Morgan Chalfant, *US Won't Pressure Ukraine to Concede Territory to Russia, Says Official*, THE HILL (June 16, 2022), https://thehill.com/homenews/administration/3526096-us-wont-pressure-ukraine-to-concede-territory-to-russia-says-official/; John Bowder, *Zelensky Says Ukraine Won't Cede Eastern Territory to Russia to End War*, THE INDEPENDENT (Apr. 17, 2022) https://www.the-independent.com/news/world/americas/us-politics/russia-ukraine-war-zelensky-donbas-b2059703.html; Zachary Rogers, *Biden Plans to Pressure Ukraine to Cede Territory to Russia-backed Groups, Report Says*, ABC NEWS (Dec. 9, 2021), https://abcnews4.com/news/nation-world/biden-plans-to-pressure-ukraine-to-cede-territory-to-russia-backed-groups-report-says; Jimmy Quinn, *Zelensky Rejects Macron Pressure to Cede Ukrainian Territory*, NATIONAL REVIEW (April 4, 2022), https://www.nationalreview.com/corner/zelensky-rejects-macron-pressure-to-cede-ukrainian-territory/; Jorge L. Ortiz, *John Bacon, Zelensky Rejects Plan to Concede Territory to Russia; Ukraine Hero Alive in Russian Custody; Live Updates*, USA TODAY (May 26, 2022, 11:34 AM), https://www.usatoday.com/story/news/politics/2022/05/25/ukraine-russia-invasion-live-updates/9916925002/; Tom Porter, *Kissinger Says Ukraine Must give up land to Russia, Warns west not to seek to humiliate Putin with defeat*, BUS. INSIDER INDIA (May 24, 2022), https://www.businessinsider.in/politics/world/news/kissinger-says-ukraine-must-give-up-land-to-russia-warns-west-not-to-seek-to-humiliate-putin-with-defeat/articleshow/91766173.cms; Steven Nelson, *Biden Says Ukraine Might Have to Give Russia Land in Negotiated Settlement*, N.Y. POST (June 3, 2022, 1:08 PM), https://nypost.com/2022/06/03/biden-says-ukraine-might-have-to-give-russia-land/. Conceding land for peace is often a privilege of the powerful in international law, with colonial ramifications beyond Ukraine's war. There is a need to break free from this bind of international law. *See* art. 22 of the Covenant of the League of Nations 1919 (on the sacred trust of civilization for those colonies who by virtue of the war had lost their previous sovereigns); *see* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL'Y 513, 587 (2001); Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of the Trusteeship*, 9 MAX PLANK Y.B. U.N. L. 47, 67 (2005); *see generally* H. H. Perritt, *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385 (2002); *see generally* Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 LONDON REV. INT'L L. 31 (2015); Rotem Giladi, *The Phoenix of Colonial War: Race, the Laws of War, and the 'Horror on the Rhine'*, 30 LEIDEN J. INT'L L. 847, 849 (2017) (exploring the anxieties and morphing of vocabularies of international law to find legal justification of colonial and racialized international law); Katherine Fallah & Ntina Tzouvala, *Deploying Race, Employing Force: 'African Mercenaries' and the 2011 NATO Intervention in Libya*, 67 UCLA L. REV. 1580, 1609 (2021).

displacement, and forced assimilation through the Indian residential school system.[35]

For centuries, tribes, nations, and peoples, perceived as the *racial other*, have been at the mercy of dominant forces to the ruin of humanity.[36] The global law and order founded on racial supremacy can never be a source of sustained peace and deracialized transitional justice. It will always be brittle and dependent on the continued strategic games of states and dominant powers. In other words, a deracialized international order is a fundamental standard for global justice, collective just security, and a deracialized transitional justice.

The continuity of treating specific populations, groups, and peoples as disposables is a significant problem in international law. This has enduring legacies for transitional justice.[37] The defunct Soviet Union had considerable labeling of communities even within the Union, suggesting that 'some are less than others.'[38] Perhaps we can also consider the insular cases in the United States increasingly highlighting the imperial circumscription of groups based on race and other categories.[39]

Other symptoms of the racial orders we maintain domestically and transnationally can be seen in migration policies and the dehumanization of suspected immigrants and workers.[40] In apartheid South Africa, Blacks were required to carry passes based on supremacist laws and regulations.[41] Colonized peoples

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[35] Matthew Evans & David Wilkins, *Transformative Justice, Reparations and Transatlantic Slavery*, 28 SOC. LEGAL STUD. 137, 142-47 (2019); Jose Atiles-Osoria, *Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice*, 7 STATE CRIME J. 349, 352 (2018); Regina Menachery Paulose & Ronald Gordon Rogo, *Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama*, 7 STATE CRIME J. 369, 375 (2018).

[36] G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartolome De Las Casas*, 2 AUST. Y.B. INT'L L. 1, 25-34 (1992); Francine Hirsch, *Opinion | 'De-Ukrainization' is Genocide—Biden was Right to Sound the Alarm*, THE HILL (Apr. 14, 2022), https://thehill.com/opinion/international/3267060-de-ukrainization-is-genocide-biden-was-right-to-sound-the-alarm/ (exploring how President Putin ramped up his rhetoric in the weeks before the war as a way of justifying the war of aggression; President Putin refers to the Ukrainian leaders as Nazis).

[37] Matiangai Sirleaf, *Disposable Lives: Covid-19, Vaccines, and the Uprising*, 121 COLUM. L. REV. F. 71, 72 (2021) (discussing the politics of Covid-19, vaccine access and how it was easy to racialize Africans. Although it is not in the context of war and refugees, the idea of disposability based on racial categorization is a feature of the evolution of international law).

[38] Jeff Sahadeo, *Black Snouts Go Home! Migration and Race in Late Soviet Leningrad and Moscow*, 88 J. MOD. HIST. 797, 797 (2016).

[39] Sherry Levin Wallach, *The Insular Cases Must Be Overturned*, BLOOMBERG L. (Aug. 3, 2022), https://news.bloomberglaw.com/us-law-week/the-insular-cases-must-be-overturned; Lawrence Hurley, *Supreme Court Declines to Consider Overturning Racist 'Insular Cases'*, NBC NEWS (Oct. 17, 2022), https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-consider-overturning-racist-insular-cases-rcna52156; Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2390, (2022); *see generally* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007).

[40] Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455 (2022) (highlighting racialized immigration laws and culture of violence against immigrants and how policies and judicial deliberations have largely left such racist laws or interpretations such as the Chinese exclusion laws intact).

[41] The Pass Laws Act 67 of 1952 (S. Afr.) (requiring Black South Africans over the age of 16 to carry a passbook everywhere at all times). There were other racial laws including The Group Areas Act 41 of 1950 (S. Afr.) (segregated living areas based on racialized categories). *See generally* Kevin Hopkins, *Assessing*

under British rule were also "British-protected persons."[42] They were designated based on the discretion of colonial administrators. The exclusion of people in the colonies from British citizenship was a tool of racial ordering, control, and domination.[43] Continuities of othering are also apparent in the case of the Rohingyas and other targeted groups worldwide.[44]

Hence, the politics and promises of being categorized as unequal, inferiors, incomplete citizens, and inchoate sovereigns remain with us. Sometimes, these designations set the foundation for mass human rights atrocities. What has been lacking is not the imaginative insight to design tools of discrimination, othering, and violence but the willingness to apply that creativity to produce an inclusive and deracialized international law order and transitional justice.

The inability of the United Nations (UN) to facilitate an amicable settlement of the Ukrainian war and the insistence on territorial expansion by Russia reveals the persisting inertia within our multilateral institutions. The entanglements of the five permanent United Nations Security Council (UNSC-P5) members with these problems have further exacerbated the incapacitations of our international institutions to reach for justice, accountability, and enduring peace.[45]

We must imagine new pathways that will guarantee the equality of all peoples, even amid unequal capacities and material resources. This entails accepting the realities of racism in the system and working to dismantle them. In **Part I**, this Article sheds light on the problems of global (in)justice, war, and postwar accountability. **Part II** probes the conflict in Ukraine—examining its imperial foundations and self-determination entwined with the conflict. **Part III** highlights how racism manifests through time, place, manner, epistemologies, and logic(s) of international law and transitional justice. **Part IV** delves into collective just security—exploring how Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) can help foster a less imperial and racialized international system and transitional justice. In **Part V**, the Article further contends that lasting global peace does not lie in violent domination. **Part VI** concludes the Article with suggestions on pathways to deracialized international law and transitional justice.

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the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation, 10 U. MIA. INT'L & COMPAR. L. REV. 241 (2001).

[42] Although a British Protected Person may hold a British passport, such a person has only certain limited privileges but not the full rights of citizenship.

[43] Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. REV. 1536 (2021) (exploring the theme of exclusion of different peoples from the international society as a core aspect of racism in international law. The Critical Race Theory Canon in International Law is gradually catching up).

[44] Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law*, 11 COLUM. J. RACE & L. 83 (2021) (on the presumed statelessness of Rohingyas and the inability of both international and domestic laws to solve the problem despite their exposure to genocide).

[45] Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SECURITY (Mar. 16, 2022), https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/.

II. The War in Ukraine, International Law and Transitional Justice

Imperial claims of superiority and racism are at the heart of the lack of accountability and limitations of transitional justice in international law.[46] This claim of superiority can also come in the form of exceptionalism—"We are not like those people."[47] For instance, the scholarly commitment to America as "the shining city on the hill," "a beacon of liberty," and "a self-righteous" nation with the capacity to advance civilization is sometimes a commitment that avoids the shortcomings of the American hegemony and also preempts any form of accountability in international law and human rights.[48]

At other times, imperial orderings and racialism in international law manifest as false universalism built around inherent exclusion. The paradox is ever present in examining international law and its evolution.[49] In the current situation, it is notable that Ukraine is an idyllic country with a strategic location that gives it an uncommon power to leverage relationships. Yet, that geography — historically coveted by hegemonic powers — has also been part of its nightmare. It is amid a raging strategic competition between powerful states and alliances. The human, material, and environmental cost of the war in Ukraine is immense and continues to mount.

War often looks like footage for those distant from the frontiers — especially after the initial shocks and outcry that follow their onset. Indifference and spatial distancing are often possible in protracted wars. But Ukraine need not become another set of footage without accountability because of imperial claims of superiority. It is an ongoing human catastrophe and a metaphor for global wars in Syria, Yemen, South Sudan, Ethiopia, or other human and environmental destruction frontiers. This Part explores the war through three important positions—foundations, violations, and potential post-conflict accountability measures.

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[46] Imperial states often have a Hobbesian disposition to international law and belief in the need to control and overawe. Larry May, *A Hobbesian Approach to Cruelty and the Rules of War*, 26 LEIDEN J. INT'L L. 293 (2013) (exploring the Hobbesian approach, although it argues specifically in the context of wars). Other scholars have also highlighted the misinterpretation of Hobbes and its subsequent misuse in international law, to mean the need for a hegemon or a preeminent sovereign with capacity on its own or in alliance with a few other states to enforce international order. *See also* James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987); David Dyzenhaus, *Hobbes on International Rule of Law*, 28 ETHICS & INT'L AFF. 53 (2014); Anthony D' Amato, *Is International Law Really "Law"?*, 79 NW. L. REV. 1293 (1985); *see generally* Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL'Y 127 (2010).

[47] Monica Ciobanu & Mihaela Serban, *Legitimation Crisis, Memory and the United States Exceptionalism: Lessons from Post-Communist Eastern Europe*, 14 MEMORY STUD. 1282 (2021).

[48] The exceptionalism is seen in the debates about courts referencing of foreign law and drawing inspiration from other systems for legal development. *See* Steven G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 BOS. U. L. REV. 1335 (2006); Sarah Cleveland, *Foreign Authority, American Exceptionalism and the Dred Scott Case*, 82 CHI. KENT L. REV. 393 (2007); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Johan D. Van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness*, 50 EMORY L.J. 775 (2001).

[49] Emmanuelle Jouannet, *Universalism and Imperialism: The True False Paradox of International Law?*, 18 EUR. J. INT'L L. 379 (2007).

A. Foundations

There are several complexities to the war in Ukraine. Yet, four foundational structures can provide meaningful standards for analyzing the problem and perhaps show how best to settle the current conflict and commence the accountability, repair, and restoration processes of Ukraine and the Ukrainian people. The first foundation is the equality of states and refraining from the use of force or threat of force in the relationship among states. Second, we must consider the issue of Self-determination as it pertains to Ukraine. The third foundation is state responsibility in international law, international criminal law, and international humanitarian law. Finally, it is imperative to situate Ukraine as a global superpower and geopolitical contestation site.

These four juridical foundations are complex because they have legal and institutional implications. How they are resolved will set the parameters of transitional justice's (*im*)possibilities. However, it is important to outline the settled canons of international law. The capacity of some powerful states to violate these canons does not detract from their legal validity.

Thus, the juridical equality of all states is fundamental to the membership, friendly relationship, and responsibility of states under the United Nations and international law regimes.[50] This *de jure* equality of states does not lose sight of the potential uneven power capabilities of states arising from such factors as better military potency or war technology: But commits to the possibilities of global peace and security hinged on deracialized humanity and collective just security.[51] Therefore, strong and seemingly weak states must settle their international disputes peacefully so that peace, security, and justice are not endangered.[52]

In that regard, states as equal sovereigns and members of the UN are forbidden from the *"threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of*

[50] Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207 (1944); Ann Van Wynen Thomas & A. J. Thomas Jr., *Equality of States in International Law—Fact or Fiction?*, 37 VA. L. REV. 791 (1951); Fredrick Charles Hicks, *The Equality of States and the Hague Conferences*, 2 AM. J. INT'L L. 531 (1908).

[51] Arnold D. McNair, *Equality in International Law*, 26 MICH. L. REV. 131, 131 (1927) (highlighting the foundations of the principle of equality of states) (quoting Oppenheim, McNair writes, "[T]he equality before international law of all states of the family of Nations is an invariable equality derived from their international personality. Whatever inequality may exist between states as regards their size, population, power, degree of civilization, wealth and other qualities, they are nevertheless equals as international persons.").

[52] The equality of states in international law is also captured by the doctrine of *par in parem non habet imperium*—no state can claim jurisdiction over another full sovereign state. It is also the foundation of state immunity in international law. *See generally* Yoram Dinstein, *Par in Parem non Habet Imperium*, 1 ISR. L. REV. 407 (1966). For more on the Pacific Settlement of Disputes in International Law, *see* U.N OFF. LEGAL. AFF., HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES OFFICE OF LEGAL AFFAIRS, at 1-20, [OLA/COD/2394] 1-20 (1992); The Final Act of the Conference on Security and Cooperation in Europe adopted at Helsinki, August 1, 1975, 14 I.L.M. 1292; Inter-American Treaty of Reciprocal Assistance, art. 1-2, Sept. 2, 1947, 21 U.N.T.S. 324. G.A. Res. 37/10, The Manila Declaration on the Peaceful Settlement of International Disputes (Nov. 15, 1982); *see* Emmanuel Roucounas, *Manila Declaration on the Peaceful Settlement of International Disputes*, U.N. AUDIOVISUAL LIBR. INT'L L. (Nov. 15, 2008); European Convention on the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 4646; General Act for the Peaceful Settlement of International Disputes, art. 44, Sept. 26, 1948, 93 U.N.T.S. 2123 (revised by the United Nations General Assembly in 1949).

the UN."[53] These fundamental prohibitions are aimed at actualizing the primary goal of the UN to maintain effective global peace and security through collective measures.[54] The jurisprudence in the field also aligns with these enunciated first principles of the United Nations Charter. In the Nicaragua Case, the International Court of Justice, in enunciating the principle of equality and friendly relations amongst states, noted that it entails the right of every sovereign state to conduct its affairs without outside interference.[55]

In those cases where it is seemingly proper to intervene, *opinion juris* is tilted towards non-interference.[56] This is clear from the jurisprudence in the Corfu Channel Case.[57] Although the United Kingdom had claimed the right to intervene by conducting a mine sweep of the Corfu Channel, which is in the territorial jurisdiction of Albania, without first obtaining the sovereign consent of Albania, the International Court of Justice held that the alleged right of intervention was a manifestation of force which is only available to the most powerful states.[58]

The principle of non-intervention in the domestic affairs of other states as an aspect of sovereignty and equality of states is also articulated in the *UNGA resolution 2131(XX)*–Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.[59] By the nature of the events, as they have continued to unfold in the war in Ukraine, Russia breached the principles of equality of sovereigns. This is even starker when the ongoing war is mirrored against the backdrop of the accepted

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[53] *See generally* U.N. Charter art. 2.

[54] *Id.* (noting that "the purpose of the United Nations is to maintain international peace and to that end take effective collective measures for the prevention and removal of threats to peace and for the suppression of acts of aggression or other breaches of the peace to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to the breach or peace."). These fundamentals are also entrenched further by the United Nations Declarations on the Principles of Friendly Relations—G.A. Res. 2625 (XXV) (Dec. 11, 1970).

[55] The Nicaragua Case, *supra* note 21, ¶ 192- 209 (¶ 202: "[T]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference: though examples of trespass against this principle is not infrequent, the Court considers that it is part and parcel of customary international law [...] expressions of an opinio juris regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find [...] The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States.").

[56] Edward McWhinney, *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960*, U.N. AUDIOVISUAL LIBR. INT'L L. (2008).

[57] Corfu Channel (Alb./U.K.), Judgement, 1949 I.C.J. 35 (Apr. 9).

[58] *Id.* at 35. ("A manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible [...] for from the nature of things, it would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself.")

[59] G.A. Res. 2131 (XX) (Dec. 21, 1965). This declaration also reaffirmed the principles of non-intervention proclaimed in the charters of the organization of American states, the league of Arab State and the Organization of African Unity (now African Union) as affirmed at the Conferences held in Montevideo, Buenos Aires, Chapultepec and Bogota as well as the decisions of the Asian-African Conference of Heads of States or Government of Non-aligned countries. *See* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345 (2009).

practices of international law, international humanitarian law, and international criminal law.[60]

On the use of force, the UN Charter envisages collective security, except in those situations whereby the state can invoke the right of self-defense.[61] However, an aggressor state cannot invoke the right of self-defense to support a war of aggression. Thus, despite the many opinions on self-defense in international law under *Article 51* of the UN Charter, self-defense depends on foundations of *necessity, immediacy, and proportionality against an armed attack*.[62] Where such conditions do not warrant an apprehension of armed attack, it would be a breach of the Charter for a state to proceed unilaterally to use force against another state.[63]

The facts of the case in Ukraine do not seem to fulfill any criteria warranting Russia's reliance on *Article 51* of the UN Charter. Notwithstanding the difference of opinions by scholars and jurists on *Article 51* to specific cases, the Russian intervention in Ukraine and the ensuing conflict is illegal under collective justice and security and states' rights to self-defense.[64]

Although Ukraine may be enjoying more visibility because of NATO's strategic commitments in Ukraine and Eastern Europe in general, Ukraine and its resilient struggle with an imperial force is a metaphor for the struggle of many similarly situated states in the global south. These interventions by very powerful states in other states, sometimes based on uncertain foundations such as "weapons of mass destruction," "advancing democracy," protecting national interests, and other justifications, are often against the racialized others, leaving many destructions and abuses in their wake. Also, they are sealed from just reckoning and transitional justice. Arguably, the fate of Ukraine has been the fate of many third-world and racialized countries over time.

This takes us to the second point in the overarching four foundations of our discourse: the right of self-determination of peoples in international law. The right to self-determination in international law plays a strong role in the ongoing conflict in Ukraine.[65] The right envisages the right of peoples to chart their own

60 Adil Ahmad Haque, *An Unlawful War*, 116 AM. J. INT'L L. 155 (2022) (symposium on Ukraine and the International Order, setting out some of the violations of international law, international humanitarian law and international criminal law arising from Russia's invasion of Ukraine).

61 *See generally* Hans Kelsen, *Collective Security and Collective Self-Defense, Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783 (1948); Stephen M. DeLuca, *The Gulf Crises and Collective Security Under the United Nations Charter*, 3 PACE Y.B. INT'L L. 267 (1991).

62 Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. INT'L L. 563 (2013).

63 For a general review of the doctrine of self-defense and the use of force in international law, *see* Russell Buchan, *Non-Forcible Measures and the Law of Self-Defense*, 72 INT'L & COMPAR. L. Q. 1 (2022); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 41 (July 8); Oil Platforms (Islamic Republic of Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 76 (Dec. 12).

64 Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defense*, 55 INT'L & COMPAR. L. Q. 963 (2006) (highlighting the conditionalities for resort to self-defense in international law).

65 Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 GER. L.J. 434 (2015).

political and national destiny.[66] This includes choosing the type of governance, the process of governance, the economic processes, and their paths toward relationships with other countries.

Yet, the right to self-determination has its admirers and those who do not admire it.[67] The right is often respected by those seeking liberation from domineering or colonial foundations of public order. For this set of people, whether as minority groups, racialized groups, indigenous groups, or colonized peoples, self-determination is a revelation of their hopes for a better future wherein they could be free from the restraints of imperial legal domination.

Woodrow Wilson believed that the doctrine of self-determination was a democratic ideal that had to be made by the people. However, he was also aware of how the European imperial powers continued their domination of many other peoples outside of Europe. Beyond the Wilsonian principles, self-determination was equally an important issue in the early years of the United Nations.[68] This is epitomized by the Declaration on granting independence to colonial countries and peoples.[69] *Resolution 1514* acknowledges the "*inalienable rights and freedom of exercise of sovereignty and self-determination of all peoples.*"[70]

The ICJ has explored the jurisprudence of the right to self-determination—upholding the underpinning principles as captured in the United Nations Charter and the UNGA *resolution 1514(XV)* of 14 December 1960.[71] It is apparent from the literature that in colonial circumstances, the right to self-determination in international law generally enjoys a stronger normative endorsement by states.[72] The legal and scholarly controversy hinges on those situations that fall under secession from independent or non-colonial circumstances.

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66 Jan Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186 (2006).

67 Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 INT'L & COMPAR. L. Q. 537 (1998); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMPAR. L. Q. 857 (1994); Matthew Saul, *Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?* 11 HUM. RTS. L. REV. 609 (2011); Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. 21 (1992); James J. Summers, *The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance*, 14 FIN. Y.B. INT'L L. 271 (2004); James J. Summers, *The Right of Self-Determination and Nationalism in International Law*, 12 INT'L J. MINORITY & GRP. RTS. 325 (2005); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMPAR. L. Q. 241 (1994); Nathaniel Berman, *Sovereignty and Abeyance: Self-Determination and International Law*, 7 WISC. INT'L L.J. 51 (1988).

68 Woodrow Wilson, President, U.S, 14 Points Address to Congress (Jan. 8, 1918) *in* LIBR. CONG., Jan. 1918.

69 *See* G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960).

70 *Id.*

71 Southwest Africa; Second Phase (Eth. v. S. Afr; Liber. V. S. Afr.), Judgment, 1966 I.C.J 6 (July 18); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

72 *See* Anna Stilz, *Decolonization and Self-Determination*, 32 SOC. PHIL & POL'Y 1 (2015). Also, self-determination is often mapped into the decolonial narrative even in the circumstances of the rights of indigenous peoples within otherwise settled sovereign and territorial jurisdictions such as in the case of Canada and Australia. *See* Karen Engle, *Indigenous Rights Claims in International Law: Self-Determination, Culture, and Development*, *in* DAVID ARMSTRONG, ROUTLEDGE HANDBOOK OF INTERNATIONAL

The doctrinal literature in international law commits to respecting the existing boundaries of states.[73] Still, the Ukrainian situation has both the controversial and the colonial situation tied together. The first part is that Ukraine, like other associated states in the defunct Union of Soviet Socialist Republics (USSR), in exercising its right to self-determination, declared its independence from the USSR in 1990 following the political and economic shifts after 1989.[74] This declaration of independence marked a watershed in the life and future direction of the Ukrainian people. Before the end of the Cold War, an attempt to declare independence would have been met with a military clampdown from Moscow.[75]

Thus, Ukraine departed from colonial dependence to political, economic, cultural, and social autonomy.[76] The autonomy and effort to consolidate this new—self-determined political trajectory is evident in their national institutions, language, economic commitments, and democratic practices.[77] Ukraine's diplomatic and strategic engagements have been adjusted since 1991 in line with this exercise of the right of self-determination.[78] Like other independent states,

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LAW 335 (1st ed. 2009); Kalana Senaratne, *A History of Internal Self-Determination*, *in* INTERNAL SELF-DETERMINATION IN INTERNATIONAL LAW: HISTORY, THEORY, AND PRACTICE 12 (2021) (exploring the evolution of the right to self-determination in international law).

73 The principle of *uti possidetis juris* highlights this canon. Recent scholarships have attempted to complicate this approach. *See* Michal Saliternik, *Expanding the Boundaries of Boundary Dispute Settlement: International Law and Critical Geography at the Crossroads*, 50 VAND. L. REV. 113 (2021); Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, *in* SELF DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95 (Christian Walter et al. eds., 2014).

74 The instrument of declaration of independence reads thus:
"In view of the mortal danger surrounding Ukraine in connection with the state coup in the USSR on August 19, 1991; continuing the thousand-year tradition of state development of Ukraine, proceeding from *the right of a nation to self-determination* (emphasis added) in accordance with the Charter of the United Nations and other international legal documents, and implementing the Declaration of state sovereignty of Ukraine, the Verkhovna Rada of the Ukrainian Soviet Socialist Republic Solemnly declares Independence of Ukraine and Creation of the Independent Ukraine state—Ukraine [...]."
See The Act of Declaration of Independence of Ukraine, Supreme Soviet of the Ukrainian SSR, Aug. 24, 1991.

75 Richard Nelson, *Moscow Crushes the Prague Spring - Archive, August 1968: How the Guardian Reported the Russian and Warsaw Pact Invasion of Czechoslovakia, 50 Years Ago*, THE GUARDIAN (Aug. 10, 2018), https://www.theguardian.com/world/from-the-archive-blog/2018/aug/10/russia-crushes-prague-spring-czechoslovakia-1968; Robert Tait, *Prague 1968: Lost Images of the Day That Freedom Died*, THE GUARDIAN (Aug. 19, 2018), https://www.theguardian.com/world/2018/aug/19/prague-1968-snapshots-day-freedom-died; Mare Santora, *50 Years After Prague Spring, Lessons on Freedom (and a Broken Spirit)*, N.Y. TIMES (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/world/europe/prague-spring-communism.html.

76 Francis X. Clines, *Ukrainian Voters Crows the Polls to Create a Nation*, N.Y. TIMES, Dec. 2, 1991, at A1.

77 On December 1, 1991, the Ukrainian public in a highly participatory referendum ratified the declaration of independence. Thereby sealing the turn towards a new social, economic, cultural and political order in the country. *See* Johnathan Steel et al., *Ukrainians Push USSR to Brink: Gorbachev Warns Independence Will be a Disaster*, THE GUARDIAN (Dec. 2, 1991), https://www.theguardian.com/world/1991/dec/02/ukraine.jamesmeek; Serge Schneemann, *Crimea Parliament Votes to Back Independence from Ukraine*, N.Y. TIMES, May 6, 1992, at A8; Francis X. Clines, *Ex-Communist Wins in Ukraine; Yeltsin Recognizes Independence*, N.Y. TIMES, Dec. 3, 1991, at A1; Francis X. Clines, *Change Is 'Natural,' Ukrainian Says*, N.Y. TIMES, Nov. 30, 1990, at 5; Stephen Kinzer, *Europe Is Expected to Move more slowly on Ukraine*, N.Y. TIMES, Nov. 29, 1991, at A20.

78 Rob de Wijk, *The Struggle for Ukraine*, *in* POWER POLITICS: HOW CHINA AND RUSSIA RESHAPE THE WORLD 137 (Vivien Collingwood trans., 2015) (on some of the history of the struggle for a different Ukraine since independence and how it maps into larger regional power relations in Europe).

Ukraine has sought relationships and courted allies from different parts of the world, including in Eastern and Western Europe. The diplomatic adjustment is a prickly matter to Russia, whose limited fortunes in international affairs since 1991 have left it seeking new ways of regaining its 'sphere of influence' in Europe and beyond.[79]

Arguably, the more contested part of self-determination is that of self-determination processes akin to secession in non-colonial contexts.[80] In several situations worldwide, achieving political independence from imperial powers did not automatically produce harmony in the polity. Rather, it was only the beginning of the real effort by the minorities to seek to chart their paths to freedom—economically, politically, socially, and culturally.

In many of these situations, marginalized communities such as indigenous tribes, loosely divided by colonial cartographers and allotted to different sovereign states, have had to seek ways of reaffirming their right to economic, social, and political self-determination.[81] In some cases, these were amicably done; in other situations, they were sources of lasting civil wars with devastating consequences for human dignity, community harmony, and global peace and security.[82] In the current situation in Ukraine, the right to self-determination has been misused by Moscow to justify its interventions.

This view that Russia is abusing the international law on self-determination by supporting 'separatist groups' and stage-managing referenda is further reinforced by the UN's condemnations of Russia. The UN has continued to condemn the Russian effort to choreograph referenda in the territories under occupation contrary to international law. Such pseudo-referenda, if successful, will permanently change the character of these territories, which are internationally recognized as Ukrainian territories even before the state of hostility.[83] The status quo *ante bellum* is that these occupied territories are within Ukraine's recognized sovereign territorial boundaries. In any peace process and post-conflict examination of the Ukrainian situation for accountability or any other form of diplomatic and legal arrangement between the parties, the state of these territories before the war will be a dispositive factor in determining the iterations of those engagements.

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[79] Paul D'Anieri, *New World Order? 1989–1993*, *in* UKRAINE AND RUSSIA: FROM CIVILIZED DIVORCE TO UNCIVIL WAR 27 (2019).

[80] Robert McCorquodale, *Self-Determination Beyond the Colonial Context and its Potential Impact on Africa*, 4 AFR. J. INT'L & COMPAR. L. 592, 593 (1992).

[81] The existence of "plurinationalism" or "plurinationalist" states is a pointer to the continued debate about the nature of self-determination that is not purely a colonial context. *See* Nancy Postero & Jason Tockman, *Self-Governance in Bolivia's First Indigenous Autonomy: Charagua*, 55 LATIN AM. RSCH. REV. 1, 3 (2020). These come with their own challenges including legal pluralism and how to balance the normative and juridical sources through constitutional making in these plurinationalists states.

[82] M. G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L.J. 321, 321 (1975) (exploring self-determination, beyond the traditional narrative of decolonization).

[83] Margaret Besheer, *UN General Assembly Rejects Russia's 'Referendums,' 'Annexation' in Ukraine*, VOICE OF AMERICA (Oct. 12, 2022), https://www.voanews.com/a/un-general-assembly-rejects-russia-s-referenda-annexation-in-ukraine-/6787420.html.

On state's responsibility in international law, states as juridical persons have obligations for their internationally wrongful acts.[84] Some of these obligations are embedded in *jus cogens* norms and other aspects of customary international law.[85] Others are articulated in conventions, treaties, and general principles of international law. Conflicts such as the ongoing war in Ukraine implicate these norms and the obligations of states. The implications can arise from the outright violation of laws of war and the commission of torture, genocide, and crimes against humanity.

The conventions and treaties form the frameworks for enforcing states' responsibility. Yet the international responsibility of states for their internationally wrongful acts does not easily yield to accountability mechanisms, especially when powerful states such as Russia, the United States, China, the United Kingdom, and France are involved.[86] This contradicts the ideals of equality of all states in international law, which is the core of contemporary inter-state relations.

The International Law Commission (ILC) Draft Articles on the Responsibility of States for their Internationally Wrongful Acts encapsulates the commitment to equality before the law of all states and provides the foundations upon which the international community seeks to build a strong accountability structure. Thus, every internationally wrongful act of a state entails the international responsibility of that state.[87]

An internationally wrongful act may include actions, omissions, or a combination of both. Whether there has been an internationally wrongful act depends on the requirements of obligation or "on the frameworks of established conditionalities."[88] In the current situation, there are pieces of evidence showing the commitment to internationally wrongful acts, beginning with the invasion of Ukraine and other ongoing violations of international humanitarian law. There are also potential cases of war crimes and crimes against humanity.[89] These internationally wrongful acts will require reparations and remediation as articulated

[84] *See generally* Stephan Wittich, *The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading*, 15 LEIDEN J. INT'L L. 891 (2002).; James Crawford, Pierre Bodeau & Jacqueline Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 AM. J. INT'L L. 660 (2000).

[85] *See* Mark W. Janis, *Nature of* Jus Cogens, 3 CONN. J. INT'L L. 359, 359 (1988) (discussing jus cogens).

[86] Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687, 694 (2022) (there are known cases of the misuse of force in international law attributable to permanent security council members of the UN. Although the authors have tried to distinguish the present situation in Ukraine from the interventions by UN P5 members, the war resonates generally like the usual justifying arguments by powerful states for their interventions in less powerful states).

[87] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 32-33 (2001).

[88] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 77 (2002).

[89] Ukraine has a pending proceeding against Russia before the International Court of Justice relating to the interpretation, application, and fulfilment of the 1948 Convention on the prevention of the crime of Genocide. More than 30 European States have applied to join this proceeding and they were so admitted by a decision of the ICJ on June 9, 2023. *See* Press Release, International Court of Justice, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), I.C.J. Press Release 2023/27 (June 9, 2023).

by the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[90]

The next point of intersection in the conflict is that Ukraine has become a site of strategic competition among states. In particular, Russia is contending for strategic positioning—depending on how many territories it can include in its imperial legacy.[91] This is not surprising considering Ukraine's declared commitment towards more alliance with NATO and the Western European States. It is a replay of what happens in many global South countries at the onset of conflicts.

For instance, external actors often jostle to influence the war's trajectory and the country's potential post-conflict disposition. It highlights how powerful states have often remodeled imperial programs and projects to meet their strategic interests.[92] These manifest in proxy wars or other forms of war commitments, sometimes without a confrontation between the powerful states.[93]

Equally, war situations often inspire an array of alliances based on ideology, economic interests, and other forms of affiliation. Yet, the human cost of war is constant, and as long as the war continues, suffering remains. The economic entanglements of Russia with other parts of Europe have made the economic sanctions less effective in checking the Russian ambition in Ukraine.

Still, this is not a mere political question because it also highlights the ineffectuality of many international institutions in managing questions of global peace and security when the interests of superpowers are involved. Third World countries and smaller states, many racialized in international law history, usually have no such luxury. Hence, the subordination of smaller states by their imperial neighbors is almost a standard feature of the international law and policy landscape. This is apparent in the ongoing war in Ukraine.

B. Violations

Besides the crime of aggression as articulated by the UN resolutions and the declarations by many other international bodies, the war in Ukraine potentially

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[90] *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 4, 833 (2002); *see generally* Felix E. Torres, *Revisiting the Chorzów Factory Standard of Reparation—its Relevance in Contemporary International Law and Practice,* 90 NORDIC J. INT'L L. 190 (2021).

[91] *See generally* Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 AM. J. INT'L L. 710 (2022) (highlighting the imperial dimensions of the war in Ukraine and the work by global south scholars to inspire a more nuanced interrogation of the union between international law, its vocabularies, it preferred canons and the colonial contestations of frontline states).

[92] During the Cold War period, powerful states jostled to control/destruction of ideological developments around the world. This is a factor to consider in the many civil wars that were fought in Africa and other places. *See* Eva Hansson, Kevin Hewson, Jim Glassman, *Legacies of Cold War in East and South Asia: An Introduction*, 50 J. CONTEMP. ASIA 493, 493 (2020); *see generally* Teresa S. Encarnacion Tadem, *The Emergence of Filipino Technocrats as Cold War "Pawns"*, 50 J. CONTEMP. ASIA 530 (2020); *see generally* Jim Glassman, *Lineages of the Authoritarian State in Thailand: Military Dictatorship, Lazy Capitalism and the Cold War Past as Post-Cold War Prologue*, 50 J. CONTEMP. ASIA 570 (2020).

[93] Alex Marshall, *From Civil War to Proxy War: Past History and Current Dilemmas,* 27 SMALL WARS & INSURGENCIES 183, 183 (2016).

violates many other aspects of international law.[94] First, it compromises global peace, justice, and security. The war affected different groups of people, including students in Ukraine from different parts of the world who were forced to abandon their studies and evacuate. We saw the racialized management of refugees.[95] Second, it has led to a disruption of food systems—especially in light of the strategic agricultural capacity of Ukraine. Third, it has added to the number of people who live as refugees around the world, especially in the neighboring countries in Europe. These violations have also been articulated by the United Nations resolutions condemning the invasion. Fourth, Russia's threat to bomb communication satellites potentially violates international laws and public policy commitments on the peaceful use of outer space.[96]

These violations are in the public domain. More important are the sets of violations that are not completely visible but are increasingly seen in news reports, including rape, the killing of civilian populations, and the bombing of hospitals, schools, churches, and the destruction of museums and other cultural property.[97]

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[94] Sofia Cavandoli & Gary Wilson, *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine*, 69 NETH. INT'L L. REV. 383, 384 (exploring Russia's claims and justifications of the latest intervention in Ukraine mirrors underlying efforts to distort international law in order to give legitimacy its war of aggression. The authors contend that the intervention is part of Russia's overreaching efforts to reassert itself over former Soviet states).

[95] The racialized nature of refugee management is increasingly receiving attention and Ukraine has illustrated the complex nature of the problem. *See* Cathryn Costello & Michelle Foster, *(Some) Refugees Welcome: When is Differentiating Between Refugees Unlawful Discrimination?*, 22 INT'L J. DISCRIMINATION & L. 244, 245 (2022); Shreya Atrey, Catherine Briddick & Michelle Foster, *Guest Editor Introduction: Contesting and Undoing Discriminatory Borders*, 22 INT'L J. DISCRIMINATION & L. 210, 211 (2022).

[96] The threat has many other ramifications for international law governing the use of the outer space. Equally, it challenges the provisions of the UN Charter which encourages friendly relations amongst states. Thus, were such a bombing to happen, it will open a strategic angle to the dispute and alter the already complex situations in ways that will compromise global peace and security. *See* U.N. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space art. 3, including the Moon and Other Celestial Bodies, *opened for signature* Dec. 19, 1966, 610 U.N.T.S. 8843; *see also* G.A. Res. 37/92 (Dec. 10, 1982).

[97] Malachy Browne et al., *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. TIMES (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html (this requires thorough investigation because the Geneva Conventions on Laws of Warfare prohibits the execution of prisoners of war); Matthew Mpoke Bigg, *An Abyss of Fear: A Report Accuses Russia of Further Abuses Against Civilians*, N.Y. TIMES (July 24, 2022), https://www.nytimes.com/2022/07/24/world/europe/russia-torture-ukraine-human-rights-watch.html (quoting Human Rights Watch report which highlights that Russian forces have turned the occupied territories into an abyss of terror); Human Rights Watch, *Ukraine: Torture, Disappearances in Occupied South—Apparent War Crimes by Russian Forces in Kherson, Zaporizhzhia Regions*, HUM. RTS. WATCH (July 22, 2022, 12:01 AM), https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south; Marc Santora, Erika Solomon & Carlotta Gall, *'Clear Patterns' of Russian Rights Abuses Found in Ukraine, Report Says*, N.Y. TIMES (April 13, 2022), https://www.nytimes.com/2022/04/13/world/europe/ukraine-russia-war-abuses.html (reporting how civilians were still bearing much of the brunt of the conflict); Nick Cumming-Bruce, *U.N. Experts Find That War Crimes Have Been Committed in Ukraine*, N.Y. TIMES (Sept. 23, 2022), https://www.nytimes.com/2022/09/23/world/europe/russia-ukraine-war-crimes-united-nations.html (the commission has documented cases of rape, torture, and unlawful confinement against children); Emma Bubola, *Ukraine Accuses Russia of Violating International Law by Placing Ukrainian Children in Russian Families*, N.Y. TIMES (Oct. 28, 2022), https://www.nytimes.com/2022/10/28/world/europe/ukraine-accuses-russia-of-violating-international-law-by-placing-ukrainian-children-in-russian-families.html (stating how Russia has been promoting efforts to transfer abandoned or orphaned children from Ukraine to Russia to have them placed in Russian families. President Putin signed a decree to simplify the process). These reposts and news headlines provide general insights to the ongoing violations in the war in Ukraine. However, they are neither

These violations have great ramifications for international criminal responsibility and international humanitarian law.[98] The violations require investigations and documentation to enable appropriate post-war accountability measures.

These transgressions may be scrutinized through the lens of three distinct legal frameworks: jus cogens norms within international law, the corpus of international humanitarian law, and the realm of international criminal jurisprudence. In operation, there is a connection or general convergence between all the different parts of international law that are implicated by the conduct of hostilities in international law. Article *2(4) of the UN Charter* prohibits the resort to force by states to resolve disputes. The attenuation of this provision is recognized in *Article 51*.[99] Self-defense is a very contested aspect of international law, considering how it has been (ab)used in recent decades.[100] Equally, the inability of the UNSC to meaningfully carry out its mandate of ensuring international peace and security because of the competing interests of the five permanent members is material in considering the current limitations in international law and collective just security.[101]

That notwithstanding, international law emphasizes collective just security and amicable settlement of disputes amongst nations. Hence, the provisions of *Chapter VII of the UN* Charter articulated the commitment to collective defense

exhaustive nor dispositive, they invite a deeper investigation regarding the nature of the crimes committed, the extent of the crimes, and the potential accountability measures which they implicate.

98 United Nations, *'Dire' and Deterioration Pattern of Rights Abuse Continued in Ukraine*, U.N. NEWS (Sept. 27, 2022), https://news.un.org/en/story/2022/09/1128131 (according to the UN, since the invasion of 24 February 2022, the UN mission has recorded 5,996 civilian deaths, including 382 children together with 8848 injured. The report noted that the actual figures are much higher due to inability to get complete information from the conflict zone).

99 *See* U.N. Charter art. 51:
"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

100 Jorge Alberto Ramírez, *Iraq War: Anticipatory Self-Defense or Unilateralism?*, 34 CAL. W. INT'L L.J. 1, 24 (2003).

101 Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 261 (1989) (highlighting how states have often deployed self-defense in support of their interests and some of the problems in the field); *see generally* Stephen M. Schwebel, *Aggression, Intervention, and Self-Defense in Modern International Law*, *in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS 530 (1994); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 174-75 (2004) (exploring the question of preemptive use of force and the arguments used by the United States to justify the invasion of Iraq in March 2003). What is visible in the field is that self-defense has been misused particularly by powerful states to intervene in the territories of other states. Even when the intervention is expected to be aimed at humanitarian ends, it has ended up making the collective security architecture of the United Nations weaker. For instance, in Libya, the intervention, though authorized by the UN was carried out in such a way that the country was thrown into a civil conflict. Thus, the humanitarian fallout of the humanitarian intervention outweighs the supposed gains of that process. It also destroyed the emerging doctrine of responsibility to protect and highlighted the ambivalence of international law to accountability for misuse of force. It also rings through the ongoing conflict in Ukraine as the Russians argue that they are intervening to protect Russians in Ukrainian territory from extermination. *See* Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 GLOB. SOC'Y 113, 113-14 (2016).

and the use of force in international law. Equally, *Chapter VI* of the UN Charter makes for the respective ways through which peaceful settlement of disputes can be made, including mediation, conciliation, good offices, arbitration, and negotiation—to forestall conflicts and situations of war, as these could endanger global peace and security.[102]

These, in combination with the rights of peoples to self-determination as recognized and guaranteed under the UNGA resolution 2105(XX) of 20 December 1965, *article 1 of ICCPR*, and *article 1 ICESCR*[103] form the network of laws generally prohibiting wars except in those special circumstances as self-defense and the exercise of the right to self-determination.[104] The right of self-defense is not a right at large:[105] It is regulated by standards of international law, including the pendency of an armed attack, [106] proportionality, and necessity.[107] Self-defense is often interpreted as an interim measure pending collective security under the United Nations. These principles are part of customary international law.[108] Together with other laws and conventions prohibiting war as a primary means of settling disputes, they are called *jus contra bellum—laws against war.*

Nonetheless, wars still break out between states, and the conduct of hostilities has to be governed by law. Thus, we have the Geneva Conventions on Laws of Warfare, the Genocide Convention,[109] the Torture Convention,[110] the Convention

[102] *See generally* U.N. OFFICE OF LEGAL AFFAIRS, CODIFICATION DIVISION, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, Sales No. E.92.V.7 (1992) [hereinafter UN HANDBOOK]; Revised General Act for the Pacific Settlement of International Disputes, *adopted on* Apr. 28, 1949, 71 U.N.T.S. 912 [hereinafter Pacific Settlement].

[103] UN HANDBOOK, *supra* note 102; Pacific Settlement, *supra* note 102.

[104] UN HANDBOOK, *supra* note 102; Pacific Settlement, *supra* note 102:
"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[105] For a highlight of some of the debates surrounding self-defense—restrictive and expansive interpretation, *see* Anne-Charlotte Martineau, *Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force,* 29 LEIDEN J. INT'L L. 95, 101 (2016).

[106] *See* The Nicaragua Case, *supra* note 21, ¶ 191.

[107] *Id.* at ¶ 176. It is also the law that the attack is also attributable to the state. *Id.* at ¶ 195.

[108] The customary law on the use of force is also a source of intense debate in the field. The puzzle existing in the field is how states operationalize these customs because often there is a misuse, and the practice of a few European states are endorsed as custom. This leaves the rest of humanity as recipients of norms while European states and their settler communities around the world remain the norm givers. These also raise puzzles for policy makers in international law because giving a sense of belonging to all parts of the globe is key to sustainable multilateralism which is central to global peace and security. *See* Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate,* 16 EUR. J. INT'L L. 803, 805 (2005); Timothy Kearley, *Raising the* Caroline, 17 WIS. INT'L L.J. 325, 326-27 (1999); Maria Benvenuta Occelli, *"Sinking" the* Caroline*: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 SAN DIEGO INT'L L.J. 467, 468-69 (2003) (arguing that the Caroline Doctrine is not customary international law considering the context of the *Caroline*, the exchanged diplomatic notes, and the time of the encounter between the British Government and the United States).

[109] Convention on the Punishment of the Crime of Genocide, *adopted on* Dec. 9, 1948, 78 U.N.T.S. 1021.

[110] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted on* Dec. 10, 1948, 1465 U.N.T.S. 24841.

Against the Use of Chemical Weapons,[111] and the Convention Against Anti-personnel Landmines.[112] These conventions form the general architecture for hostilities: Regulating how wars are fought and attempting to moderate the violations that could arise in one state's unregulated use of violence against another.[113]

These laws are essential to any meaningful analysis of conflicts to ensure that laws and norms of war are not violated and what is to be done if they are violated. They are equally foundational to accountability during wars and in postwar just reckoning. International humanitarian law considers these prohibitions and seeks to ensure that belligerents do not act with impunity, especially regarding captured and wounded combatants, targeting civilian populations, and using prohibited weapons.[114] Where these customs and positive international law instruments on warfare and the regulation of the conduct of hostilities are violated, they form the basis for criminal responsibility against persons who are guilty of these egregious violations.

Historically, the international community has relied on special tribunals, such as the ones in Nuremberg, Tokyo, Rwanda, and Yugoslavia, to hold accountable those who are alleged to have committed genocide, war crimes, or crimes against humanity. These tribunals have inspired the establishment of the International Criminal Court, which is responsible for prosecuting those who violate the laws of war.

In light of the ongoing war in Ukraine, it is crucial to view the general war environment as a crime scene that warrants thorough investigation by neutral entities, such as the United Nations and other multilateral institutions. This approach will ensure that the findings are useful for accountability purposes and for preserving knowledge and learning lessons.[115] Such knowledge will be beneficial in preventing future violations arising from wars, or the illegal intervention of powerful states in the territories of other seemingly less endowed states.

C. (Un)Accountability and Transitional (In)Justice

The conflict in Ukraine has once again shown the world the true cost of war. The human toll of the conflict is obvious and serves as a reminder of the fragility of peace. It also highlights the need for constant vigilance through an international law that is unbiased, works of justice, and collective efforts to ensure just security. Ukraine is not the only country that has suffered from human

111 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature on* Jan. 19, 1993, 1975 U.N.T.S. 33757.

112 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *adopted on* Sept. 18, 1997, 2056 U.N.T.S. 35597.

113 Daniel Frei, *The Regulation of Warfare: A Paradigm for the Legal Approach to the Control of International Conflict*, 18 J. CONFLICT RESOL., 620, 620-21 (1974).

114 NILS MELZNER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 77-127 (Etienne Kuster ed., 2016) (on the conduct of hostilities).

115 The United Nations has established a body of inquiry on the Ukrainian war. *See* Human Rights Council Res. 49/163, U.N. Doc. A/HRC/RES/49/1 (March 4, 2022) (deciding to urgently establish an independent international commission of inquiry to among other things investigate all alleged violations and abuses of human rights).

catastrophes due to war. Libya, Syria, Yemen, South Sudan, and parts of Eritrea and Ethiopia have also faced similar tragedies, including famine and starvation resulting from conflicts in those regions.

However, the situation in Ukraine has its unique aspects due to Russia's illegal territorial ambitions. Currently, Russian forces occupy territories within Ukraine's internationally recognized borders at various levels. Moreover, Russia has threatened to use nuclear power and other forms of deadly force in the conflict.[116] There has also been a threat to bomb communication satellites belonging to states that are assisting Ukraine.[117]

Thus, the situation in Ukraine is complex, as it involves a conflict with a nuclear power that holds significant political and diplomatic influence. It raises questions as to whether those responsible for violating international law will be held accountable and what steps need to be taken to ensure that justice is served. Failing to hold those responsible accountable could set a dangerous precedent. There are two approaches that could be taken: conflict accountability efforts and post-conflict accountability measures. These could be implemented by Ukraine or through international accountability mechanisms like the Rwandan and Yugoslav Criminal Tribunals. However, obstacles exist, such as Russia's membership in the UN Security Council and the dysfunction within the UN's dispute resolution system.

To establish a global accountability order that is fair and promotes peace, powerful states, and their officials need to be held accountable for their actions. This requires a concerted effort by the international community to collect and preserve evidence of violations of international law. Those who violate these norms will likely try to destroy evidence, making it even more essential to prioritize evidence gathering. Institutional condemnation of the war and a commitment to accountability are also critical for establishing a framework for justice.

Although general economic sanctions have been imposed on Russia by NATO and her allies, the reality is that the network of economic entanglements between Russia and the rest of Europe—especially in energy supply and the reliance of Europe on Russian gas—has meant that Russia has continued to access financial

[116] BBC Visual Journalism Team, *Putin Threats: How Many Nuclear Weapons Does Russia Have?*, BRITISH BROADCASTING CORPORATION (Oct. 7, 2022), https://www.bbc.com/news/world-europe-60564123; Helene Cooper, Julian E. Barnes & Eric Schmitt, *Russian Military Leaders Discussed Use of Nuclear Weapons, U.S. Officials Say*, N.Y. TIMES (Nov. 2, 2022), https://www.bbc.com/news/world-europe-60564123; Associated Press, *Putin Says 'No Need' for Using Nuclear Weapons in Ukraine*, PBS (Oct. 27, 2022, 2:55 PM), https://www.pbs.org/newshour/world/vladimir-putin-rules-out-using-nuclear-weapons-in-ukraine#:~:text=MOSCOW%20(AP)%20%E2%80%94%20Russian%20President,insisted%20are%20doomed%20to%20fail.; Sam Meredith, *Putin's 'Incredibly Dangerous' Nuclear Threats Raise the Risk of an Unprecedented Disaster'*, CNBC NEWS (Sept. 23, 2022, 3:49 AM), https://www.cnbc.com/2022/09/23/russia-ukraine-war-putins-nuclear-threats-raise-the-risk-of-disaster.html (were such use of nuclear force to happen, it will totally alter the dynamic of the war, and potentially have larger implications for global health, environmental safety and non-proliferation accords).

[117] Joey Roulette, *Russia's Anti-Satellite Threat Tests Laws of War in Space*, REUTERS (Oct. 27, 2022, 11:10 PM), https://www.reuters.com/world/russias-anti-satellite-threat-tests-laws-war-space-2022-10-28/#:~:text=The%20Liability%20Convention%20of%201972,orbit%2C%20blasting%20it%20to%20smithereens.

resources.[118] Thus, economic sanctions may have a limited impact on the leaders of Russia.[119] Furthermore, it is worth considering that economic sanctions often immiserate ordinary citizens. Leaders often continue to live their normal lives. Therefore, the place of economic sanctions in situations of war needs significant recalibration and rethinking. It is thus imperative to combine the sanctions with vigorous diplomatic efforts to end the war as the first step towards accountability in a post-conflict scenario.

Ukraine has taken steps to claim reparations against Russia. This has been pursued through the UNGA and other international and multilateral institutions. Ukraine has also secured provisional measures against Russia from the International Court of Justice. The ICJ has enjoined Russia and Ukraine to interim measures, including immediate suspension of military operations that it commenced on 24 February 2022 in the territory of Ukraine. Both parties are also enjoined to refrain from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.[120]

Following the request of the Ukrainian Permanent Representative to the United Nations through the President of the UN SECURITY COUNCIL (S/2014/136), the UNGA has since endorsed a resolution.[121] Amongst other commitments, the UNGA resolution—*furtherance of remedy and reparation for aggression against Ukraine*—recalled other important resolutions related to the war in Ukraine to reaffirm Ukraine's sovereignty and territorial integrity.[122] Therefore, while the resolution called on Russia to unconditionally withdraw from Ukrainian territories, it recognized the need for accountability by Russia for any violations of

118 The Economist, *Why Russian Oil and Gas is Still Flowing Through Ukraine*, THE ECONOMIST (Mar. 30, 2023), https://www.economist.com/europe/2023/03/30/why-russian-oil-and-gas-is-still-flowing-through-ukraine (even in war, old pipelines and contracts die hard); John Psaropoulos, *Europe Leaps Towards Energy Autonomy as Sanctions Undercut Russia*, AL JAZEERA, (Feb. 28, 2023), https://www.aljazeera.com/news/2023/2/28/europe-leaps-towards-energy-autonomy-as-sanctions-undercut-russia. Some of the reasons for failure of economic sanctions to tame violent regimes includes the possibilities of "arbitrage", existing contractual commitments, carefully framed contractual clauses and solidarity with like-minded states. In many respects the unrestrained use of economic sanctions impacts more the lives ordinary citizens. *See generally* Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AM. J. INT'L L. UNBOUND 135 (2022); Michael Bradley, Irving de Lira Salvatierra, W. Mark C. Weidemaier & Mitu Gulati, *A Silver Lining to Russia's Sanctions-Busting Clause?*, 108 VA. L. REV. ONLINE 326 (2022).

119 Justin Spike, *Hungary Forces New Energy Deals with Russia Amid Ukraine War*, A.P. NEWS (Apr. 12, 2023, 12:47 PM), https://apnews.com/article/hungary-makes-new-energy-agreement-russia-c069d83bc748cb820c3958bbecf13f17.

120 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order, 2022 I.C.J. 182 (Mar. 16). The ICJ has over time developed the practice of interim measures in similar situations in exercise of its mandate and jurisdiction as the highest judicial organ of the United Nations. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020, I.C.J. 178 (Jan. 23); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Order, 2021 I.C.J. 361 (Dec. 7).

121 G.A. Res. A/ES-11/L.6 (Nov. 7, 2022) (furtherance of remedy and reparation for aggression against Ukraine).

122 G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022) (Aggression against Ukraine); G.A. Res. A/RES/ES-11/2 (Mar. 24, 2022) (Humanitarian Consequences of the Aggression Against Ukraine); G.A. Res. A/RES/ES-11/4 (Oct. 12, 2022) (Territorial Integrity of Ukraine; Defending the Principles of the Charter of the United Nations).

international law, the need for the establishment in cooperation with Ukraine of an international mechanism for the reparation for damage, loss or injury arising from the internationally wrongful act of Russia; and, recommended for the creation of an international register to serve as a record, in documentary form of evidence and claims information and damages.[123]

The resolutions and legal proceedings brought before courts, including the ICJ, have three major legal implications for accountability in post-conflict situations.

Firstly, these resolutions provide current opinions of the United Nations and the International Court of Justice in relation to the war. Having such opinions documented makes it easier for future legal and policy interventions to reference and utilize them for the purpose of providing reparative measures against Russia. These resolutions and provisional orders also establish the state of the law, thus preventing any arguments to the contrary. At the very least, they restate the law on wars and accountability, and they establish the history of proceedings and the parties' efforts to ensure accountability.

Secondly, the resolutions and voting patterns of countries that are not directly involved in the war can have a significant impact on opinio juris and the behavior of states. These patterns can give policymakers or diplomats an idea of where each country stands and what they can do to build consensus and create multilateral solutions to a complex problem in the international sphere. Diplomatic exchanges and good offices efforts can also have significant legal implications for conflict resolution. They provide evidence of diplomats and other functionaries in international law on the subject matter at the time, thus laying the foundations for future resolutions and judicial interventions on the subject.

Finally, these resolutions and legal proceedings foreclose plausible deniability by any party to the conflict regarding international law and the expectations of the international community. Other accountability efforts can come from Criminal Tribunals, Truth Commissions, and Memorial programs. These have to be carefully considered and should be context-driven. Whatever approach is adopted should center the victims and their voices instead of centering the voices of international experts.[124] Although international experts' voices are crucial in formulating accountability policies and projects, they have limitations. Such limitations include the potential disposition towards transplanting mechanisms or approaches that may not fit the values and contexts of the emergent post-conflict society.

Thus, measures should be finely balanced with the community's dispositions on how and what they want in postwar accountability programs. This is critical considering how expertise in the field can be highly political because "expert' knowledge tend[s] to be legal, foreign and based on models to be replicated elsewhere."[125] Accountability is imprescriptible, and the failure of international

123 *See* G.A. Res. A/ES-11/L.6 (Nov. 7, 2022).

124 Kieran McEvoy & Kirsten McConnachie, *Victims and Transitional Justice: Voice, Agency and Blame*, 22(4) SOC. & LEGAL STUD. 489, 496-97 (2013); *see generally* Cheryl Lawther, *'Let Me Tell You': Transitional Justice, Victimhood and Dealing with a Contested Past*, 30 SOC. & LEGAL STUD. 890 (2021).

125 *See generally* Briony Jones, *The Performance and Persistence of Transitional Justice and its Ways of Knowing Atrocity*, 56 COOP. & CONFLICT 163 (2021) (highlighting the fact that expertise in transitional

law to hold powerful states accountable is a recipe for cycles of conflict and increased diminution of human dignity. This takes us to the next Part—the spheres of racism in transitional justice.

III. Spheres of Racism in Transitional Justice

The boundaries of racism in transitional justice can vary depending on various factors such as religion and economic capacities. However, we can easily identify four important markers to track the extensions of racism. These markers include time, place, manner, and epistemologies of transitional justice. This section delves into these pillars to provide scholars with a framework for understanding the different forms of racism in transitional justice. The ultimate goal is to achieve global peace, collective just security, and deracialized international law and order.

A. Temporal Considerations

Transitional justice's spheres of racism have often manifested in the structure and normative foundations of transitional justice. One way to explore this is through transitional justice's privileged temporalities and spatial dimensions.[126] Regarding the temporalities or the time-related issues of transitional justice, the takeoff point appears to me to be the historical gap regarding the violence against blacks and other persons of color.

The genealogy of transitional justice is often traced to Nuremberg.[127] This justice genealogy with Nuremberg as the lodestar has many limitations and ramifications for transitional justice. First, it omits many eras and iterations of racialized violence—including property seizures, forced displacement, enslavement, uncompensated labor, and the genocidal elimination of "natives" and indigenous peoples[128]—which ultimately formed the groundwork of colonialism and its enduring consequences in our current global international law order.[129]

justice is both a fact of epistemic community and also political. What is also undertheorized is how epistemic communities can be conservative in terms of membership and diversity of opinions and scholarship. So, there is often a gap regarding the experts and possibilities of racialized communities to participate as interlocutors in that 'exclusive' epistemic community).

126 Zinaida Miller, *The Injustices of Time: Rights, Race, Redistribution, and Responsibility*, 52 COLUM. HUM. RTS. L. REV. 648, 662 (2021); Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L CRIM. L. REV. 848 (2021).

127 Teitel, *supra* note 1.

128 *In re* Southern Rhodesia, 211 A.C. (1919); Johnson v. M'Intosh, 21 U.S. 543 (1823) (natives do not have the powers to devise land); Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978); David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159 (1994); Geoffrey WG Leane, *Indigenous Rights Wronged: Extinguishing Native Title in New Zealand*, 29 DAL. L.J. 42, 46 (2006).

129 Rosemary Nagy, *Settler Witnessing at the Truth and Reconciliation Commission of Canada*, 21 HUM. RTS. REV. 219 (2020) (highlighting how there is a sense of minimalist exploration of the impact of settler colonialism on natives and why this makes a difference in temporal understandings and ramification of transitional justice measures); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006).

Second, it peripheralizes the resistance and efforts of the racialized groups in international law. Thus, the story leaves the agency and efforts of those who have suffered the burden of the ideals of racial othering in international law to the discretion of the conquering powers. They end up in the historiography of human rights merely as victims and less as persons who also exercised meaningful agency in the resistance of conquering powers.

This type of approach has significant ramifications for the ultimate memory and values embedded in international law and transitional justice. For instance, the Haitian developmental trajectory, the resistance of the people, and the enduring burden of colonial debts are somewhat minimized because of the temporal commitments of transitional justice. This can also be applied in evaluating the larger quest for colonial reparations by the Caribbean states.[130]

Third, it potentially silences (if not erase) the stories of these communities, decenters their experiences, and marginalizes their potential contributions to the answers to our current dilemmas about managing diversity and creating a more inclusive humanity.[131] For example, the pivot to decolonizing international law by mostly global south scholars has enriched the discipline. Yet, the diversifying opportunity is coming behind the principal narrative of transitional justice hinged on Nuremberg and post-World War II perspectives of international human rights.

In many respects, that narrative and scholarship partly led by the path-breaking intervention of Ruti Teitel (a good faith effort, in light of the prevailing scholarship at the time) have dominated the doctrinal foundations of transitional justice.[132] This narrative map into the larger discourse about the origins of human rights in international law and its continuities, which has seen Moyn and Martinez, for instance, place its origins at different timelines and circumstances.[133]

The global recognition of Genocide through the 1949 Genocide Convention and other human rights commitments also has significant ramifications for transitional justice temporalities. The temporal commitments map into a "memory gap" in international law whereby the narratives of the discipline omit the experiences of people who are often racialized.[134] The problem, however, is that this

[130] José Atiles-Osoria, *Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice*, 7 STATE CRIME J. 349 (2018).

[131] Julika Bake & Michaela Zohrer, *Telling the Stories of Others: Claims of Authenticity in Human Rights Reporting and Comics Journalism*, 11 J. INTERVENTION & STATE BLDG. 81 (2017).

[132] The pioneering work of Ruti Teitel is very crucial in understanding the field. But like every pioneer, the initial mapping may have missed some important landmarks especially when the lights are focused on other more recent questions of violations such as the Holocaust, military dictatorships in Argentina, and disappearances in Latin America. *See generally* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003); *see generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

[133] *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2011); *see generally* Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HAR. L. REV. 2043 (2013) (book review).

[134] *See generally* Stiina Loytomaki, *The Law and the Collective Memory of Colonialism: France and the Case of Belated Transitional Justice*, 7 INT'L J. TRANSITIONAL JUST. 205 (2013) (examining slavery and indentured labor which have not been central themes of transitional justice projects); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99 (1997); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986).

transitional justice model has ended up having a tepid gaze on the history of racialized violence before 1945.[135]

Temporal decentering or erasures are significant technologies of racism in transitional justice. It has ramifications for the mandates of transitional justice mechanisms, the envisaged remedial measures, and the accepted standards in the discipline.[136] There is the argument about inter-temporal law, which has implications regarding when we can say that a norm of international law that warrants obligations *erga omnes* has emerged. It also touches on the epistemologies of transitional justice and international law. As articulated by Max Huber in the *Island of Palmas Case*, the doctrine of inter-temporality requires that the law adjudge the legality of an act with the law in force when the event or act occurred. Equally, it considers any change in the law over time.[137]

This doctrine of inter-temporality has featured interestingly in cases of reparations, with some arguing that colonial violations will not require reparations because such crimes as genocide had not emerged in international law during the period of colonization.[138] The debate is rather curious considering the consistent condemnation of the violations of the rights of indigenous communities and other colonized peoples, which are contemporary with the acts and events.

Transitional justice has created divisions along colonial lines and between the North and South. These binaries are used to maintain the status quo and prevent any meaningful discussion of issues related to racism and social justice. Furthermore, time is often used as a tool to evade or downplay the importance of these issues—especially in mature democracies.

Part of it is the belief that issues of racism can be taken care of "with time," Not because of any concerted effort by the polity in issue but by the natural flow of things. This has been part of the attitude that has sustained racial inequity in transitional justice and international law. Dr. Martin Luther King Jr. noted how this commitment that racism will disappear with time because time is ultimately curative of ills in society does not stand any meaningful scrutiny.[139]

In many respects, the temporal disposition toward racism also creates a legislative gap that entrenches racism in both international law and the domestic

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135 Victoria Roman, *From Apology to Action: A Comment on Transitional Justice in the United States and Canada*, 37 MD. J. INT'L L. 122 (2022).

136 Tom Bentley, *A Line Under the Past: Performative Temporal Segregation in Transitional Justice*, 20 J. HUM. RTS. 598 (2021).

137 T. O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980) (foundational insight regarding the doctrine of inter-temporality); Panos Merkouris, *(Inter)Temporal Considerations in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?*, 45 NETH. Y.B. INT'L L. 12 (2014); Zhenni Li, *International InterTemporal Law*, 48 CAL. W. INT'L L.J. 342 (2018) (a doctrinal exploration of temporality).

138 *See generally* Andreas von Arnauld, *How to Illegalize Past Injustice: Reinterpreting Rules of Intertemporality*, 32 EUR. J. INT'L L. 401, 409 (2021); Jeremy Sarkin, Carly Fowler, *Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia*, 9 HUM. RTS REV. 331 (2008); Ryan M. Spitzer, *The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery*, 35 VAND. L. REV. 1313 (2021).

139 Dr Martin Luther King Jr., The Other America (Apr. 14, 1967) ("there are those [...] often sincere people, who say [...] only time can solve the problem"). Dr. King calls this a myth because time is neutral and can be used negatively or positively for human rights and so we must help time.

order, thereby frustrating transitional justice. The legislative gap can be seen, for instance, in the long-lasting struggle for the prohibition of lynching. It took more than a century to legislate federally against lynching in the United States.[140] The Congressional attempt to study enslavement and potential reparations is a case in point. It also fits into the element of epistemologies of transitional justice regarding what counts as appropriate subjects of transitional justice. This takes us to the issue of the place of the execution or implementation of transitional justice and its racialism in the next section.

B. Spatial Commitments and Geography

Racism in transitional justice has also authored the geography of transitional justice as more of a project for the global south.[141] For instance, over the past three decades, more than 40 countries have executed one form of Truth Commission or another.[142] These projects are also almost bound to arenas of recent conflicts and post-authoritarianism. Therefore, older democracies appear to have no need for transitional justice except in those limited circumstances, as we saw with the Canadian Truth Commission and the Australian Sorry Day.[143] This somewhat consolidates the mistaken duality of developed and uncivilized, which has been the foundation of several human rights violations, including race-based violence and prejudice.

Increasingly, scholars are recognizing the geographical commitment and its racial problems. Others have also argued that the universalist and liberal approaches of transitional justice without due regard to the histories of the place of execution constitutes an epistemic violence. Yet significant work remains to be done in weaning the foundations from its geographical binders. Complicating

[140] Magdalene Zier, *Crimes of Omission: State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era*, 73 STAN. L. REV. 777 (2021).

[141] There are ongoing debates regarding the potential scope and normative foundations of transitional justice in the United States. *See generally* Fernando Travesí, *Repairing the Past: What the United States Can Learn from the Global Transitional Justice Movement*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (July 15, 2021), https://www.ictj.org/news/repairing-past-what-united-states-can-learn-global-transitional-justice-movement; Colleen Murphy, *Transitional Justice in the United States*, JUST SECURITY (July 16, 2020), https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/; *see generally* Ashley Quarcoo & Medina Husaković, Racial Reckoning in the United States: Expanding and Innovation on the Global Transitional Justice Experience (Oct. 26, 2021) (working paper, Carnegie Endowment for International Peace); Yuvraj Joshi, *Racial Transitional Justice in the United States*, *in* RACE AND NATION SECURITY (Matiangi Sirleaf ed., 2023); Brianne McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, OPINIO JURIS (May 6, 2020), https://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/; Sujaya Rajguru, *Fulfilling the Promises of Our Preamble: A Holistic Approach to Transitional Justice in the United States*, 58 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 356 (2023); Coleen Murphy, *How Nations Heal*, BOSTON REVIEW (Jan. 21, 2021), https://www.bostonreview.net/articles/colleen-murphy-transitional-justice/.

[142] Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 22 J. WORLD PEACE 86, 87 (2005).

[143] *See* Kieran McEvoy et al., *Apologies in Transitional Justice (Invited report for UN Special Rapporteur on Transitional Justice)* (2019) (on inspirations for apologies in transitional justice); Robert R. Weyeneth, *History, Memory, and Apology: The Power of Apology and the Process of Historical Reconciliation*, 23 PUB. HISTORIAN 9, 14 (2001); Michael Murphy, *Apology, Recognition and Reconciliation*, 12 HUM. RTS. REV. 47, 56 (2011); *see generally* Tom Bentley, *Colonial Apologies and the Problem of the Transgressor Speaking*, 39 THIRD WORLD Q. 399 (2018).

the geographies of transitional justice has consequences for dismantling the pillars of racism for historically unjust problems such as slavery, lynching, and violent law enforcement regimes inspired by racism. It will also help international human rights law overcome some difficulties, such as the limited possibilities of human rights accountability against businesses.[144] The ability to place transitional justice elsewhere, especially in the global south and perhaps Eastern Europe, facilitates indifference since they often appear vague and disconnected.

Human rights violations that require transitional justice review are often not matters of distant lands. They are matters of human flourishing and resonate across national boundaries with implications such as population dislocations, forced migrations, refugees, and human trafficking. These also have global security implications, and we can only be as secure as our commitment to the security of others.

Equally, the places of transitional justice have been circumscribed—excluding certain colonial enclaves, such as the Chagos Archipelago, from the general principles of self-determination and human rights recognition, reparations, and remediation. The enclosure of these spaces, even when the historical injustices arising from them are noted, is an enduring legacy of racism and coloniality in international law. They have continued to limit the spatial dimensions of transitional justice. Although the International Court of Justice has since ruled on the matter in favor of the Chagossians, the imperial interests of the United Kingdom and the United States loom over the archipelago, and the forcefully ejected inhabitants are yet to return.[145] Indeed, many of the inhabitants who were ejected after 1965 are at different stages of incomplete compensation and resettlement in the United Kingdom.

C. Epistemologies and Logics

How we know a thing and the sources of knowledge are critical commitments of philosophy, law, politics, and general human learning.[146] What counts as knowledge can be dispositive in the design of policies, programs, institutions, and even constituting the public sphere. The methods for accessing and assessing

[144] *See* Upendra Baxi, *Some Newly Emergent Geographies of (In)Justice: Boundaries and Borders in International Law*, 23 IND. J. GLOB. LEGAL STUD. 15, 24 (2016) (for a general critique regarding the geographical commitments that make human rights accountability difficult).

[145] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, Advisory Opinion, 2019, I.C.J. 169 (Feb. 25); *see generally* Douglas Guilfoyle, *The Chagos Archipelago Before International Tribunals: Strategic Litigation and the Production of Historical Knowledge*, 21 MELBOURNE J. INT'L L. 1 (2021); Patrick Wintour, *UN Court Rejects UK Claim to Chagos Islands in Favor of Mauritius*, THE GUARDIAN (Jan. 28, 2021), https://www.theguardian.com/world/2021/jan/28/un-court-rejects-uk-claim-to-chagos-islands-in-favour-of-mauritius.

[146] MICHEL FOUCAULT, GUARDIAN DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27 (Alan Sheridan, trans. 1975) (arguing amongst other things that "there is no power relation without a correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations").

knowledge can also make a difference in the community's life—individually and otherwise. Therefore, knowledge is a virtue and power.[147]

It is a virtue because those who possess knowledge are deemed cultivated and imbued with the fine traditions and ethos of the community. It is also invaluable because it generally inebriates the holder's life. Scholars such as Bertrand Russel have explored this subject.[148] It is power because it can assist the holder in navigating the muddles of life and society. Education unlocks the inner person by removing the shackles of ignorance. This is why civilizations, evolutions, and paradigm adjustments often depend on new ideas and knowledge.

Knowledge is the lynchpin of policy. The whole sphere of intellectual property law is a tribute to this reality. Knowledge sets the metrics, indicators, logics, and methodologies of transitional justice. Yet several factors affecting access to knowledge, who counts in knowledge making, and what counts as true knowledge are not evenly distributed. In international law and its tributaries, the flow of knowledge that counts has often traced the riverbeds and fountains of Europeanism.[149]

Hence, the modern history of international law has been the peripheralization of the ideas, ideals, practices, and views of minorities—often racialized others. Transitional justice has also fallen victim to this racialized international law. We see this in the privileging of global north voices on transitional justice knowledge-making even when the project is sited in global south communities.[150]

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147 Jose Maria Rodríguez García, *Scientia Potestas Est – Knowledge is Power: Francis Bacon to Michel Foucault*, 28 NEOHELICON 109, 119 (2001).

148 BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 1 (2009). Russel began his philosophical discourse by noting the puzzling nature of how we come to know things thus:
"Is there any knowledge in the world which is so certain that no reasonable man could doubt it? This question, which at first sight might not seem difficult, is really one of the most difficult that can be asked. When we have realized the obstacles in the way of a straightforward and confident answer, we shall be well launched on the study of philosophy—for philosophy is merely the attempt to answer such ultimate questions, not carelessly and dogmatically, as we do in ordinary life and even in the sciences, but critically, after exploring all that makes such questions puzzling, and after realizing all the vagueness and confusion that underlie our ordinary ideas."

149 The return to the history of international law has seen a more deliberate scholarly engagement with the eurocentrism of international law. Yet the epistemic space of international law is still disproportionately occupied by European voices. *See generally* Ntina Tzouvala, *The Specter of Eurocentrism in International Legal History*, 31 YALE J. L. & HUMAN. 413 (2021); James Thuo Gathii, *The Promise of International Law: A Third World View*, 36 AM. U. INT'L L. REV. 377, 385 (2021); Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT'L L. 335 (2005); Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, *in* OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (2012) (Bardo Fassbender & Anne Peters eds.); James Thuo Gathii, *International Law and Eurocentricity*, 9 EURO. J. INT'L L. 184 (1998); Anne-Charlotte Martineau, *Overcoming Eurocentrism? Global History and the Oxford Handbook of International Law*, 25 EURO. J. INT'L L. 329 (2014); Martti Koskenniemi, Histories of International Law: Dealing With Eurocentrism, Nov. 26, 2011 (Inaugural Lecture delivered on the occasion of accepting the treaty of Utrecht Chair at Utrecht University); Onuma Yasuaki, *When was the Law of International Society Born? –An Inquiry of the History of International Law from an Inter-Civilizational Perspective*, 2 J. HIST. INT'L L. 1 (2000).

150 Laurel E. Fletcher & Harvey M. Weinstein, *How Power Dynamics Influence the "North-South" Gap in Transitional Justice*, 37 BERKELEY J. INT'L L. 1 (2018) (highlighting how local transitional justice practitioners are often peripheralized by international law scholars); Laurel E. Fletcher & Harvey M. Weinstein, *North-South Dialogue: Bridging the Gap in Transitional Justice, Workshop Transcript*, 37 BERKELEY J. INT'L L. 29 (2018).

To surmise, the epistemologies and logics of transitional justice as it relates to racism in transitional justice can be explored from two positions: source of knowledge/voice and theories, themes, and philosophies. On the source of knowledge, the cooptation of transitional justice as part of liberal peacemaking and the privileging of voices from the global North is an example. This is reflected in how international law and governance institutions focused on personal violations while remaining ambivalent towards economic and social rights.[151] The issue of cultural heritage, cultural property expropriation, particularly regarding the intellectual resources of indigenous peoples, remains a topic of discussion. Unfortunately, our current intellectual property regimes do not easily recognize this problem, leading to a lack of prioritization of subjects like reparations for enslavement, repatriation of looted art, colonialism, and other forms of injustice to racialized peoples. This lockdown on what is considered proper subjects of transitional justice sustains the racialism of international law, even in the choice of experts who contribute to the reservoir of knowledge. Racism can manifest in subtle ways, where the subaltern is spoken to, and for in the evolution of international law, and in the barriers that prevent global South scholars from participating in epistemic communities and spaces.

The theories and philosophies that underpin transitional justice also exhibit racialism, with the exclusion of transformative theories from mainstream discourse. Consequently, transitional justice struggles to centralize issues like property, slavery, indentured labor, colonialism, sovereign debt, or the impunity of businesses regarding violations of the environment and destruction of indigenous communities' livelihoods.

Thus, power relations often dictate what is considered essential in international law, leading to compromised justice and an inability to achieve a deracialized international order. Additionally, transitional justice falls short in addressing subjects like the looting of artifacts and the appropriation of revenues arising from indigenous art objects due to the limitations of its epistemologies and logics.[152]

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151 Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice for Violations of Economic and Social Rights*, 32 NETH. Q. HUM. RTS. 183 (2014). The privileging of individual rights decentralizes community rights. This stymies meaningful debate about community justice. Thus, subjects such as reparations are boiled down to whether there are individual survivors of enslavement to whom reparations can now be paid. Equally, it plays into the narrative that asking a for reparations is like holding individuals who did not participate in enslavements or such other historical injustices accountable. Individualized commitments therefore censor the epistemologies and potential deliberative commitments of transitional justice which can unlock restorative justice. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Susan S. Kuo & Benjamin Means, *A Corporate Law Rationale For Reparations*, 62 B.C. L. REV. 799 (2021) (giving a more robust review of reparations using such corporate law principles as unjust enrichment).

152 Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EURO. J. INT'L L., 49 (2011) (highlighting the difficulty in restituting looted art during the genocide. It is even more difficult in the case of looted colonial art); Franziska Boehme, *Normative Expectations and the Colonial Past: Apologies and Art Restitution to Former Colonies in France and Germany*, GLOB. STUD. Q., Oct. 2022, at 2 (highlighting how the treatment of restitution of artefacts and apologies are treated as separated both from colonialism writ large and also from each other—thus frustrating and delaying the possibilities inherent in transitional justice engagement).

IV. Collective Just Security and Racial International Law

In our previous conversation, we discussed the basic details of the conflict in Ukraine, including violations and an overview of its implications. We also examined instances of racism according to international law. In this Part, we will explore how conflicts have racialized foundations, and how they contribute to ongoing tensions. By utilizing Critical Race Theory and Third World Approaches to International Law, we can demonstrate what is possible if we allow them to influence the increasingly dry canon of international law. This is especially important since theories of domination have proven to be unhelpful to humanity.

A. Conflicts and Racialized International Law Order

Although politics amongst nations continue to hold, international peace and security are not merely questions of real politick and relations of states amongst themselves. Other competing cannons of international law believe that there is a need to restrain force by law and justice—a rules-based international order.[153] This is traceable to many treaties, conventions, and practices, such as the UN Resolution on Friendly Relations Among States.[154] Other critical articulations in declarations and institutional frameworks show states' preference for an international law regime founded on self-determination and collective approaches to common problems such as conflicts, climate change resilience, and justice amongst peoples and nations.[155]

Nonetheless, while international law commits to these fine values of pacific settlement of disputes, it has the enduring problem of adopting taxonomies that are difficult, if not entirely belligerent, to make international norms and principles. At times it is a nothing to see or learn attitude towards certain groups and societies. This is with particular reference to marginalized groups. For instance, our idea of 'just war' has often come with very limited recognition of the inherent humanity of indigenous and marginalized groups: And thus, nothing for them to contribute to the evolution of canons of international law. Where international law recognized the inherent humanity of marginalized groups in international law history, it did so only to the extent that they were considered inferior to Europeans. So, international law taxonomies have this uncanny capacity to consistently do more violence to those marginalized based on race, religion, or region.

Thus, whether as "civilizing mission," "white man's burden," "indirect rule," "assimilation," "sphere of influence," "colony," "French interest," "United States interest," "Russian interest," "Chinese interest," or "British interest," there is a

153 Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Order*, 16 EURO. J. INT'L L. 369 (2005) (highlighting the complex oscillation of international law between the pursuit of justice and its instrumentation for power by powerful states).

154 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *supra* note 21.

155 Mortimer N.S. Sellers, *The Purpose of International Law Is to Advance Justice — and International Law Has No Value Unless It Does So*, 111 AM. SOC'Y INT'L L. 301 (2017).

sense that we often do not lack taxonomies and theories that can justify our domination of the other.[156]

The ongoing conflict in Ukraine reveals a disposition towards domination and subjugation. Unfortunately, the human aspect of the war has been overlooked for too long, and its entanglements with collective security and international peace have not been given enough attention. This has significant implications for transitional justice, as racialized groups are often the ones who are dominated and colonized. To avoid conflicts and manage them effectively when they do happen, it is necessary to deracialize international law. Racism, along with its related phenomena such as racial prejudices and legal orderings, is deeply entrenched in our world. Conflicts and racism are intertwined in many ways. Firstly, racism justifies subjugating the other, which limits the opportunity for intergroup dialogue.

Secondly, racism is linked to cultural superiority, which eliminates the chance to learn about other cultures. In this sense, the perception of inherent inferiority of one culture justifies cultural superiority. Thirdly, positioning one race as superior over another eliminates the need for multicultural mutual respect and existence, and instead leads to forced assimilation or extinction of the other culture. Many wars have arisen due to this type of racial crucible.

The Constitution of the United Nations Education and Scientific Organization acknowledges that war begins in the minds of human beings. This can sometimes arise from ignorance and, at other times, spring from general suspicion or distrust.[157] Hence, it is worthy of note that what UNESCO enunciated many years ago is still a significant factor in the ongoing conflicts worldwide.[158]

Race, racism, and ethnically based prejudices persist in international law and have lasting impacts on wars and their externalities, including internal displacement, refugee problems, starvation, and human rights violations, war crimes, crimes against humanity, and genocide—as exemplified by the ongoing Ukrainian conflict. UNESCO was founded to combat racial superiority and promote cross-cultural dialogue through education to reduce prejudices, phobias, and hatreds that lead to conflicts between communities.

As a result, the United Nations Economic and Social Council recommended that UNESCO study the racial question. Subsequently, the 1969 Convention on the Elimination of All Forms of Racial Discrimination was adopted and ratified by member states. However, the convention failed to end the racialization of international law and its structures. At the time, international law had several inhibitions, including apartheid, segregation against natives and other racialized

156 *See* Samuel Garrett Zeitlin, *Francis Bacon on Imperial and Colonial Warfare*, 83 REV. POL. 196 (2021).

157 The Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Nov. 16, 1945.

158 UNESCO on the ideology of racism in the UNESCO report notes that:
"racism is a particularly vicious and mean expression of the caste spirit. It involves belief in the innate and absolute superiority of arbitrarily defined human group over other equally arbitrarily defined groups. Instead of being based on scientific facts, it is generally maintained in defiance of the scientific method. As an ideology and feeling racism is by its nature aggressive."
Id. at 3.

groups, and European states' colonial domination of other peoples. In 1969, many wars of decolonization struggles were still ongoing in parts of Africa. There were also concerns about the interventions of powerful states in the political evolution of states in Africa, Asia, and Latin America. For example, Mozambique, Zimbabwe, and Angola were still fighting for political independence from European colonizers when the UN Convention Against Racial Discrimination was adopted.[159]

The Unilateral Declaration of Independence in Zimbabwe by Ian Smith in 1969 heightened the struggle in that country and only ended in 1980. Thus, the work of deracializing international law and order did not stop with the Convention on the Elimination of all Forms of Racial Discrimination in 1969. Transitional justice has been unable to overcome the strategic commitments of frontline states in many of these hitherto hybrid settler colonial states, such as Zimbabwe and South Africa. For instance, in Southern Africa, transitional justice is still at a loss regarding how to embrace the land and other proprietary questions.[160] The failure of government policies and the evident over-politicization of the questions have equally contributed to the transitional justice gap.[161] The downside to this is the lopsided landholding structure based on racial lines. Equally, global economic structures make centralizing land questions in transitional justice an unwelcoming idea.[162]

The Cold War era brought about a reality where the permanent members of the Security Council could invade and destroy other territories in defiance of the UN Charter. This was done to protect one form of racial, economic, and political ideology or another. Even today, we witness nationalism, racialism, and cultural supremacy being mobilized to pursue wars of frontline states. The ongoing crisis in Ukraine is an example of this, with Russia seeking to reassert its dominance in the region and over states previously under its sphere of influence in the Soviet Union's heyday.

Unfortunately, international institutions that proclaim equality and equity continue to falter in the face of racialized immigration and refugee policies, climate change-induced disruptions, and the general securitization of the international movement of people. Persons from the global South are increasingly

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159 Mozambique became independent in 1974; Zimbabwe 1980; Angola 1974.

160 Bernadette Atuahene, *Property and Transitional Justice*, 58 UCLA L. Rev. 65 (2010); Helena Alviar Garcia, *Transitional Justice and Property: Inextricably Linked*, 17 Ann. Rev. L. & Soc. Sci. 227 (2021). For further examination of the subject of property and transitional justice, *see* Nashon Perez, *Property Rights and Transitional Justice: A Forward-Looking Argument*, 46 J. Pol. Sc. 135 (2013); Kezia Batisai & George T. Mudimu, *Revisiting the Politics of Land Recovery Among White Commercial Farmers in Zimbabwe: Implications for Transitional Justice*, 15 Int'l J. Transitional Just. 370 (2021); Ntina Tzouvala, *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration and the Question of Race in International Law*, 2 J. L. & Pol. Econ. 226 (2022).

161 Edward Lahiff, *Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform*, 28 Third World Q. 1577 (2007); Edward Lahiff, *Stalled Land Reform in South Africa*, 115 Current Hist. 181, 181-87 (2016); Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism (Sam Moyo & Walter Chambati eds., 2013).

162 *Zimbabwe Agrees to Pay USD 3.5 Billion Compensation to White Farmers*, Reuters (July 29, 2020, 6:22AM), https://www.reuters.com/article/us-zimbabwe-farmers/zimbabwe-agrees-to-pay-3-5-billion-compensation-to-white-farmers-idUSKCN24U1OM.

humiliated at international borders simply because of their nationality. During the COVID-19 pandemic, African states faced heightened quarantine measures from the global North, even though the disease's prevalence was significantly lower in Africa.

To achieve peaceful resolution of disputes and contentions amongst states, the blindness of international law to the color line must be addressed. This requires exploring alternative approaches to international law beyond legal formalism and claims of neutrality of the law, which can be exclusionary. Cultivating the international juridical mind is crucial to finding solutions to conflicts. The CRT canon and TWAIL are important to inebriate the mind of international law and open the eyes of its operators to the racialized foundations instigating conflicts such as the war in Ukraine. We need to recognize the right of all human communities, including indigenous and other marginalized communities, to exist. We must not prioritize the Westphalia order and progressivism without recognizing this fundamental right, which can lead to continued subjugation.

B. Critical Race Theory: Six Tenets, Four Ramifications

In this Section, I explore the six tenets of CRT and highlight their ramifications for international law—emphasizing its relevance to our search for global peace and collective just security. Critical Race Theory has complicated international law's sacred, universalist, and linear progressive narratives. It faults the liberal critique and peace without reparations and other forms of transformative just reckoning in the commitments of the transitional justice canon. Transitional justice, as a discipline, is in dire need of a Critical Race Theory upgrade. Critical Race Theory offers us a tool for analytical and historical examination of international law and its governance of many aspects of international society—including transitional justice accountability.

Thus, Critical Race Theory is a juridical canon developed in the US legal academy. The theory, amongst other things, commits to excavating and dismantling the racialized law structures in society. Unlike the liberal critic of the law, CRT is committed to changing the structures since they are racialized, and only their elimination—not superficial reordering—could guarantee the minimum content of justice, equity, and equal humanity promised by the law. CRT espouses six foundational principles.

First, Critical Race Theory contends that Racism is *not an aberration* in the law. Instead, racism is part of the law and reproduces itself through hierarchies and processes privileged by the dominating social order. Hence, it is structural and fundamental to sustaining the racialized hierarchy in society. The racialized *others* experience this racialized order in law in their everyday encounter with the law and its institutions, such as law enforcement and the administrative state.

In transitional justice, as it has been implemented, the hierarchy of imperial states has often made them seem untouchable in international law. For example, militaries from imperial states are scarcely subjected to post-war accountability or transitional justice. The principle of complementarity in international criminal law has not solved the problem. In peacekeeping, soldiers are also known

to violate the rights of minorities—often racialized communities—and the UN has been unable to provide effective accountability structures. The intergenerational continuities of this lack of reckoning are seen in teenage pregnancies and children who are also doubly victimized by the local communities because of the circumstances of their birth. This has yielded a duality of transitional justice structures, which all appear unable to rein in the capacities of powerful states to violate the rights of perceived inferior states despite the professed equality of states in international law.

Secondly, CRT commits to *interest convergence*. That is to say that although racism abounds in the legal structures of law, minor adjustments and reforms often occur to accommodate only those reforms that will support the dominant order. Changes are, therefore, allowed as long as they do not alter the established hierarchy and will advance other interests of the dominant racial group. This is also referred to as material determinism. It can be argued that interest convergence has shown itself in transitional justice in those respects, such as Nuremberg, where the imperial states had a common adversary: Nazi Germany. The inability of imperial states—especially through the Security Council of the UN—to find a common interest, whether during the Cold War or elsewhere since the end of the Cold War, has been to the detriment of transitional justice. Thus, powerful states can escape accountability. The Russian invasion is also evidence of a lack of interest convergence—especially on the part of the UNSC-P5 members—the guardians and guarantors of global peace and security as contemplated by Chapter 7 of the United Nations Charter.

Third, CRT propositions that race is *a social construct*—the result of social ideas and ideologies that portray one arbitrarily identified group, persons, or society as inferior to another yet arbitrarily predetermined group, persons, and society. It can metamorphose in the constructors' minds and adapt new taxonomies, especially in situations of war or repressive law enforcement, as we have continually seen in the less-than-generous portrayal of CRT in public discourse in some quarters.

Fourth, *Intersectionality:* CRT theorizes that there are overlapping identities in society, which can have ramifications for the way certain members of the community experience the law. These overlapping identities can attract different racialized treatment. For instance, a Black, Muslim, international Student in Ukraine may experience racism differently based on these three intersecting identities. The experience with law enforcement within the country and at border crossings may also differ. The case can also be complicated for a female, hijab-wearing, international student. These rough examples highlight the intersectionality cannon of Critical Race Theory, and it is crucial in understanding the embeddedness and ramifications of race in international law, the use of force, and conflict.

One of the insoluble difficulties of transitional justice as a discipline is how to convene and calibrate intergroup dialogues in communities with entangled yet different identities and ideological dispositions. Because the best forms of transitional justice efforts can only take place in an atmosphere of mutual recognition and respect for the dignity of all members of the community, in many

"post-colonial" states, the problem of diversity and identity management is a crucial factor in racialization and lack of transitional justice accountability. In Sudan, contesting national identity based on religion and race frustrated peaceable polity and ultimately separated the country.

Fifth, CRT *does not defer to the 'post-racial lingo.'* CRT does not think that racism is a historical relic, unlike the way it is often treated in mainstream legal literature. Sometimes, judicial deliberations also look at race and racism as something that was in the past and the light of the civil rights movements and judicial interventions in *Brown v. Board of Education*[163] and *Loving v. Virginia*.[164] Therefore, we have put behind the demon of racism as captured in *Scot v. Sanford*.[165]

Yet the daily experience of Blacks and other minorities in America does not give credence to a "post-racial" order.[166] This post-racial lingo has continued to factor in transitional justice's (im)possibilities. Thus, transitional justice must reimagine how to cultivate the many groups in any country to the end of justice.

As captured in their narratives, the ordinary daily experience of the racialized is that racism is a live issue, and the structures of domination in a society constantly inebriate it. This is evident in jury selection, zoning laws, and incarceration statistics.[167] The consequence of this is a reticence towards transitional justice in America. The cannon responds accordingly sometimes to avoid being seen to be causing division.

Thus, despite the lofty promises of law—especially international law through the Universal Declaration of Human Rights and other instruments—race is alive and well. The promises of equality, diversity, and inclusive prosperity are continuously deferred. It is still a racialized world, considering how the law and policy disposition towards Ukraine has unfolded. Although European states embraced Ukrainian refugees, there is still no strong assurance that Russia would be held to account beyond the economic sanctions that the Kremlin appears to be taking in its stride.

The sixth canon of the CRT is that it recognizes the uniqueness of the minority voice—the voice of the racialized is important, and any lasting effort to deracialize and enhance just peace must reckon with these voices. This voice is valid in

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163 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

164 Loving v. Virginia, 388 U.S. 1 (1967).

165 Dred Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

166 Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Courts Criminal Jurisprudence*, 110 CAL. L. REV. 681 (2022); Mario L. Barnes, *The More Things Change: New Moves for Legitimizing Racial Discrimination in a Post-Race World*, 100 MINN. L. REV. 2043 (2016).

167 Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. C. L. REV. 5 (2022); Werner Troesken & Randall Walsh, *Collective Action, White Flight, and the Origins of Racial Zoning Laws*, 35 J. L. ECON. & ORG. 289 (2019); A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535 (2021); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021) (highlighting—amongst other things—systemic racism in the prisons system); *see generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS (2010); Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2019); James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004).

curating ideas and norms of law—not as an afterthought or token of diversity but as a core piece of the legal architecture.

These six canons of CRT have solid ramifications for understanding the war in Ukraine and the (im)possibilities of transitional justice. Four solid CRT ramifications distillable from the ongoing war in Ukraine are also relevant to our search for enduring peace and collective just security. They are: The racialization of the other or their inferiorization to rationalize the war. Russia has tried to cultivate a legitimizing narrative for the war. In other words, the emblem of inferiority placed on the other, is a means of cultivating military and citizenship consensus. This narrative makes it less difficult to coopt international law and the language of international law to pursue their ends. Thus, showing the other as evil seems to be a generative foundation of war commitments and racialized violence.

The next ramification of the war is segregation, and disparate treatment, based on identities despite the promises of international law to the contrary. This is with particular reference to the processing of refugees escaping the war into neighboring European states.[168] The near-seamless access granted to Ukrainian refugees contrasts sharply with the pictures of Syrians assailed by border patrols and bodies on the shores of the Mediterranean.[169] In many other ways, it contrasts with the treatment of those with the intersecting identities of Black, poor, and religious minorities. Many observers of international law were puzzled at this different treatment.

For Black students studying in Ukraine at the onset of the war, the experience with the system of protection and processing, especially with border agencies, was also difficult—they were treated almost as disposables or general collateral losses of the pandemic and war. For these Black students' racism is not a thing of the past; it is their lived experience, even in the face of the war. In a world where some passports are considered more powerful than others, the implications of carrying a passport from a country deemed not in the peer of many European or North American states could mean the difference between life and death in times of conflict, pandemics, and possibilities for refugee status and asylum.[170]

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[168] Transitional Justice is yet to explore the meaning of borders as sites of racialized violence. The deference to absolute sovereign discretion which is at the core of international law is a factor in this state of affairs. However, scholars are beginning to think of how to utilize transitional justice mechanisms for border related issues such as Asylum. *See* Katie Wiese, *Human Rights in Our Backyard: Utilizing a Truth Commission and Principles of Transitional Justice to Address Atrocities Committed against Asylum Seekers in the United States*, 36 GEO. IMMIGR. L.J. 461 (2021).

[169] Whereas it would have been idea not to have a comparison of Refugees, the reality in the field shows different treatment accorded to refugees depending on their race, nationality, religion, and gender. Eileen Pittaway & Linda Bartolomei, *Refugees, Race, and Gender: The Multiple Discrimination Against Refugee Women*, 19 REFUGE 21 (2001); Nicola Pocock & Clara Chan, *Refugees, Racism and Xenophobia: What Works to Reduce Discrimination?*, U.N. UNIV.: OUR WORLD (June 20, 2018), https://ourworld.unu.edu/en/refugees-racism-and-xenophobia-what-works-to-reduce-discrimination; Philip Marcelo, *In US's Welcome to Ukrainians, African Refugees See Racial Bias*, PBS NEWS (Apr. 1, 2022, 1:49 PM), https://www.pbs.org/newshour/politics/in-u-s-s-welcome-to-ukrainians-african-refugees-see-racial-bias; *Europe's Different Approach to Ukrainian and Syrian Refugees Draws Accusations of Racism*, CBS NEWS (Feb. 28, 2022, 8:34 PM), https://www.cbc.ca/news/world/europe-racism-ukraine-refugees-1.6367932.

[170] This experience is something familiar to Global South scholars. They often have to navigate difficult immigration pathways to attend conferences or to participate in other potentially transforming training across their limited national spaces. Unlike their counterparts residing in the Northern Hemisphere. This affects agency and participation in knowledge production in their respective fields. Priya Dixit, *Encounters*

This, therefore, alters the proclaimed neutrality and equal application of international law. It is worth thinking about how many border detention facilities worldwide should be sites of racial and transitional justice reckoning?[171] Yet, the cloak of sovereignty covers borders and, by extension, immigration detention centers.[172]

The third ramification is that of fragmentation and lack of interest convergence, and this has frustrated the capacity of the United Nations Security Council to meet its obligations under *Chapter 7 of the UN Charter*. This is because all five permanent members have strategic interests regarding Ukraine, amongst other things. It is not easy to discountenance this confluence of interests because unless there is a convergence, the inertia in the multilateral systems for collective security will continue to flourish. Critical Race Theory offers a tool of analysis that can help rekindle multilateralism in the face of the global challenges that require common approaches as opposed to the unilateral and often war-prone approaches to security.

The other limb of the analysis on interest convergence is the fragmented interest convergence, which has shown how NATO countries are aligned with Ukraine, while some other states outside the NATO alliance are on the side of Russia or are generally non-aligned. In that regard, NATO's commitments to the membership of Ukraine, which appeared unsure previously, seem to have become more robust.[173] Yet, it is left to be seen what the processes will look like in the years ahead. What is clear is that the human consequences of the war have not diminished. An *interest convergence* analysis of the policy dispositions of the respective groupings and countries can help outline potential grounds for consensus building and diplomatic intervention for global peace and security, especially within the UN multilateral system.

Nonetheless, it is also a racialized issue since much of the third world is often the racialized other. Like Ukraine, third-world countries have often fought wars of self-determination while in the crosshairs of the competing interests of imperial structures. Thus, while not comparing the violations, many of these states often see some of the differential treatments of wars depending on the interest

with Border: A Migrant Academic's Experiences of the Visa Regime in the Global North, 14 LEARNING & TEACHING 55 (2021).

171 Scholars are already interrogating immigration law and policy from a racial and social justice standpoint. This includes teaching and other activities regarding immigrations. *See generally* Kevin R. Johnson, *Teaching Racial and Social Justice in the Immigration Law Survey Course*, 67 St. Louis U. L.J. 473, 473 (2023); Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139,1139 (2021).

172 Achuime has explored how borders are sites of the racialized operation of international law. Often, the categories used are aimed to be selective, ensuring that only those that meet the expected class and racial prescriptions pass the process. *See*, E. Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445, 445 (2022).

173 Tom Balmforth, *Ukraine Applies for NATO Membership, Rules Out Putin Talks*, REUTERS (Sept. 30, 2021), https://www.reuters.com/world/europe/zelenskiy-says-ukraine-applying-nato-membership-2022-09-30/#:~:text=KYIV%2C%20Sept%2030%20(Reuters),had%20annexed%20four%20Ukrainian%20regions; Olafimihan Oshin, *NATO Leader on Ukraine's Fast-Track Into Alliance: Membership has to be Taken by Consensus*, THE HILL (Oct. 2, 2022, 4:58 PM), https://thehill.com/homenews/sunday-talk-shows/3671189-nato-leader-on-ukraines-fast-track-into-alliance-membership-has-to-be-taken-by-consensus/ (Zelensky notes that Ukraine is de facto in alliance with NATO).

of the UNSC-P5 members and the geolocation of the conflict. Examples can be found in the Middle East, Asia, Latin America, and Africa. These have ramifications for potential accountability measures, whether through criminal tribunals, truth commissions, or reparations.

Thus, the potential impossibility of accountability for violations of international law by those guilty of the most egregious human rights violations is a common attribute of imperial wars, whether in colonial times or the post-1945 world. Except in those situations in the past where there has been a total defeat of the powerful state, and the extraction of reparations, it is often difficult to hold powerful states accountable.[174]

The Rome statute relies on the doctrine of complementarity, which entails that states have the primary responsibility to prosecute those guilty of war crimes, crimes against humanity, and genocide. Yet, the ICC may step in where the country has neither the capacity nor interest to prosecute the crimes.[175] A commencement of prosecution of the state on any of these crimes involving UNSC-P5 members could mean that the ICC is barred from moving forward with prosecutorial processes. However, these countries' policies and legal dispositions do not inspire much hope that they would abide by the international criminal law regime anchored on the Rome Statute.[176]

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[174] Here, the Treaty of Versailles 1919 (World War I), the Nuremberg Trials, and the Tokyo Tribunals (World War II) come to mind. The refusal of the UNSC-P5 states, such as the United States, China, and Russia, to subscribe to the International Criminal Court (ICC) also makes it difficult to hope for accountability under the Rome Statute. The United Kingdom and France are the only Permanent Security Council members that have acceded fully to the Rome Statute. The UK deposited her instrument of ratification on October 4, 2001, while France did same on June 9, 2000. The United States, China, and Russia are not state parties to the Rome statute. India, Pakistan, and North Korea are also not members of the ICC. Ukraine is not a state member of the ICC. Russia and the United States withdrew their signatures from the Rome Statute of the ICC. *See* Shaun Walker, *Russia Withdraws Signature From International Criminal Court Statute*, THE GUARDIAN (Nov. 16, 2016, 9:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute#:~:text=Russia%20withdraws%20signature%20from%20international%20criminal%20court%20statute,-This%20article%20is&text=Russia%20has%20said%20it%20is,of%20Crimea%20as%20an%20occupation (Russia withdraw shortly after the ICC published a report classifying the Russian annexation of Crimea as an occupation); *see* ICC OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2016); Ivan Nechepurenko & Nick Cumming-Bruce, *Russia Cuts Ties With International Criminal Court, Calling it 'One Sided'*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/world/europe/russia-withdraws-from-international-criminal-court-calling-it-one-sided.html. The US also withdrew its signature from the Rome Statute: *see* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT' L. 683, 683-702 (2003).

[175] Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 SANTA CLARA J. INT'L L. 165 (2010).

[176] A recent effort by the ICC prosecutor to investigate allegations of violations in Afghanistan elicited a very strong response from the US government. *See generally United States Imposes Economic Sanctions and Visa Restrictions on International Criminal Court Officials*, 115 AM. J. INT'L L. 138, 138-40 (2021); Daphne Psaledakis & Michelle Nichols, *US Blacklists ICC Prosecutor Over Afghanistan War Crimes Probe*, REUTERS (Sept. 15, 2020, 3:49PM), https://www.reuters.com/article/usa-icc-sanctions-int/u-s-blacklists-icc-prosecutor-over-afghanistan-war-crimes-probe-idUSKBN25T2EB; Lara Jakes & Michael Crowley, *US to Penalize War Investigations looking into American Troops*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html; Julian Borger, *Trump Targets ICC With Sanctions after Court Opens War Crimes Investigation*, THE GUARDIAN (June 11, 2020, 12:37 PM), https://www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions; Evert Elzinga, *US Threatens to Arrest ICC Judges if They Pursue Americans for Afghan War Crimes*, FRANCE24 (Oct. 9, 2018), https://www.france24.com/

Ad hoc International Criminal Tribunals will only happen with the consensus of UNSC-P5 members. In many respects, accountability may be far-fetched.[177] The downside of this looming lack of accountability is that respect for the international rule of law is disincentivized. Such a perception of lack of accountability is a recipe for conflicts and violence.[178]

It is also important to look at the complimentary cannon of TWAIL and its ramifications for the war in Ukraine. CRT and TWAIL complement each other in many respects, and a careful synthesis of both genres is critical to our search for a deracialized and inclusive international law and, transitional justice. The next Section highlights TWAIL, its themes, and its ramifications for the enduring problem of racism in international law and transitional justice using the Ukrainian war as a point of intersection.

C. Third World Approaches to International Law: Three Themes, Two Ramifications

The War in Ukraine and what we can do in pursuit of global collective just security, peace, and equal accountability leads us to consider other important perspectives and what they can contribute to our current dilemmas. Thus, TWAIL is an attempt by other peoples of the world to assert their agency by speaking for themselves, and avoiding the erasure that the Eurocentric order of international law has often accomplished by purporting to speak for everyone and in a vocabulary that is universal, rational, and objective. For instance, a TWAIL critique of the ICC has arisen from this perception of power relations to the (im)possibilities of equal accountability in International Criminal Law.[179]

TWAIL is a response to the epistemologies of violence stemming from European foundations and conceptions of the nature and implications of international

en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes. The US also issued Executive Order placing sanctions and visa restrictions on ICC personnel. The Executive Order has now been rescinded. *See* Antony J. Blinken, *Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court*, US DEPARTMENT OF STATE (Apr. 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

[177] In a recent case involving a Navy Seal, the accused was pardoned despite the weight of evidence against him. *See* Thomas Wayde Pittman & Matthew Heaphy, *Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity Before the International Criminal Court*, 21 LEIDEN J. INT'L L. 165 (2008); Richard Luscombe, *Navy Seal Pardoned of War Crimes by Trump Described by Colleagues as 'Freaking Evil'*, THE GUARDIAN (Dec. 27, 2019, 11:03 AM), https://www.theguardian.com/us-news/2019/dec/27/eddie-gallagher-trump-navy-seal-iraq; David Lapan, *War Crime Pardons Dishonor Fallen Heroes*, THE ATLANTIC (May 24, 2019), https://www.theatlantic.com/ideas/archive/2019/05/trumps-pardon-of-war-crimes-erodes-trust-in-military/590197/.

[178] One can as well speculate that this state of affairs is a potential factor in the nuclear arms race because it seems violence or the capacity of violence is the dispositive factor for international respect, and recognition by imperial states.

[179] Makau Mutua, *The International Criminal Court: Promise and Politics*, 109 AM. SOC'Y INT'L L. 269, 269-72 (2015) (highlighting some of the critique of the ICC especially in Africa including politicization); Charles C. Jalloh et al., *Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5 (2011); John Reynolds & Sujith Xavier, *The Dark Corners of the World*, 14 J. INT'L CRIM. JUST. 959 (2016); Obiora Chinedu Okafor & Uchechukwu Ngwaba, *The International Criminal Court as Transitional Justice Mechanism in Africa: Some Critical Reflections*, 9 INT'L J. TRANSITIONAL JUST. 90 (2015).

law, transitional justice and reparations. In the United States, enslaved persons who fought in the Civil War or their descendants who fought in World War II did not receive the same honors accorded to their European comrades in battle. Social benefits arising from their commitment to the service of liberty were also administered discriminately. Indeed, some Black (African American) war veterans were lynched for not knowing their place in society when they returned from the great war.[180]

TWAIL, as a project, therefore, seeks to unpack and deconstruct the methodologies, mythologies of universalisms and norm-making processes and the impact of international law on the global South. There is, therefore, an important intersection between TWAIL and CRT in that both are committed to excavating the foundations that affect the fate of the marginalized in law. These could be marginalized groups based on race and ethnicity, religion, economic standing, and power relations.

TWAIL opposes exploitation, colonization, and conquest, which is seared into the patterns of Eurocentric approaches to international law. Transitional justice will gain a lot from the TWAIL insight as it searches for the continued deracialization of its accountability mechanisms, including memorialization and the narratives that surround them. Thus, territorial expansion and forced assimilation through wars violate the primary canon of TWAIL.

To change this situation, TWAIL proposes three fundamental principles. First, TWAIL seeks to deconstruct international law as a medium for the perpetuation of the racialized hierarchy of international law norms and institutions that facilitate the subordination of non-Europeans to Europeans. Second, TWAIL seeks to present an alternative normative legal structure for international governance. Third, TWAIL aims through policy and politics to eradicate the conditions of underdevelopment in the third world.[181]

There are two broad ramifications of TWAIL to the war in Ukraine and the efforts to use multilateral platforms such as the United Nations to intervene in the conflict. The first is the evident disinclination of many third-world countries to take sides in the war.[182] The second is the seeming comparison regarding how the current war in Ukraine has been handled, the reactions and responses of the UN and the global North in general, and other situations of belligerence in the global South.

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[180] Peter C. Baker, *The Tragic, Forgotten History of Black Military Veterans*, NEW YORKER (Nov. 27, 2016), https://www.newyorker.com/news/news-desk/the-tragic-forgotten-history-of-black-military-veterans; Gillian Brockell, *A Black WWII Veteran Voted in Georgia in 1946. He Was Lynched for It*, WASH. POST (Sept. 13, 2020, 7:00AM), https://www.washingtonpost.com/history/2020/09/13/maceo-snipes-lynching-vote-all-in-stacey-abrams/; Alexis Clark, *Returning From War, Returning to Racism*, N.Y. TIMES (Sep. 8, 2020), https://www.nytimes.com/2020/07/30/magazine/black-soldiers-wwii-racism.html.

[181] *See generally* Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. 31 (2000).

[182] David Adler, *The West v. Russia: Why the Global South Isn't Taking Sides*, THE GUARDIAN (Mar. 28, 2022), https://www.theguardian.com/commentisfree/2022/mar/10/russia-ukraine-west-global-south-sanctions-war; Elizabeth Sidiropoulos, *How do Global South Politics of Non-alignment and Solidarity Explain South Africa's Position on Ukraine?*, BROOKINGS (Aug. 2, 2022), https://www.brookings.edu/articles/how-do-global-south-politics-of-non-alignment-and-solidarity-explain-south-africas-position-on-ukraine/.

V. Just Transitions and Peace in an (Un)Equal World: Pathways

Recall that the United Nations was founded especially to guarantee global peace and security at the end of World War II. The Charter of the UN highlighted, among other things, the equality of states and the need to prevent the recurrence of war because of its incalculable cost to humanity. This was further reinforced by the adoption of the UDHR and the Agreements on the Pacific Settlement of Disputes, which enjoined state parties to seek a peaceful settlement of contentions.[183]

Thus, the collectivization of global peace and security under the UN was to ensure, amongst other things, the peaceful settlement of disputes between states and to avoid the repetition of the human rights catastrophe of World War II—including genocide and the use of nuclear weapons. The provisions of Chapter VI of the UN Charter articulate the ways and means of pacific settlement of disputes, including conciliation, mediation, arbitration, negotiation, and a combination of processes. Chapter VII also established the UN Security Council as the plenary body charged with the primary responsibility for using force to secure global peace and security.

This duty hinged on collective peace and security and did not extinguish states' rights to use force in self-defense under *Article 51* of the UN Charter. While *Article 51* preserved states' rights to self-defense, jurisprudence in the field leans in favor of collective self-defense as opposed to unilateral actions by states. However, other opinions are often wedded to the permanent five members of the United Nations Security Council (UNSC), which seems to emphasize unilateral actions or a coalition of the willing unduly. Over the years, the practice of states on self-defense can be cataloged into three patterns. First, collective self-defense and security under the auspices of the United Nations and its organs. Second, collective self-defense and security by a coalition of states. Thirdly, there are those who view self-defense as an absolute prerogative that does not require collective security under the UN.

Beyond these approaches linked to the UN, regional organizations and aligned and non-aligned coalitions have also emerged in response to geopolitical realities within their specific regions. Therefore, this geopolitical specificity and the sometimes-institutional inertia within the UN have reinforced the congregation of states with similar ideologies, values, and interests for collective security and self-defense.

For instance, the North Atlantic Treaty Organization (NATO) has a full structure of governance and collective mobilization of finance and strategic resources in pursuit of their collective self-defense. Before the end of the Union of Soviet Socialist Republics, there was also the WARSAW group constituted by affiliate states to the Soviet Union as a counter system to NATO. There is also within the Economic Community of West African States (ECOWAS) the existence of a regional peacekeeping mechanism called the ECOMOG (Ecowas Monitoring Group), which came into being in response to the many civil wars and consequent

[183] On the global commitment to the peaceful settlement of international disputes, *see* Convention on the Pacific Settlement of International Disputes (Hague Convention 1), Jan. 26, 1910.

human rights abuses in the region in the 1990s. ECOWAS partners with the UN and other international organizations in peacekeeping in the region. The ECOWAS forces are contingent, and the states in the region contribute these forces as the need arises.[184]

The establishment of the powers of the Security Council and its functions under Chapter 7 of the UN Charter is a recognition of the *de facto* unequal power dynamic within our international law architecture. This is even more so if we consider that at the formation of the UN in 1945, many of the global South countries were still under colonial domination. India and Pakistan, two major regional powers in Asia, were still under colonial rule. Nigeria, Algeria, and many other African states were also under colonial rule—with some other states existed as trusts and non-self-governing territories. Nonetheless, the effort to forge global peace and the flourishing of all human societies cannot be accomplished if the relationship of states with one another is purely dependent on power and might, instead of justice and equitable application of the international rule of law. A rule-based international order cannot rely on domination as Russia tries to do with the current war in Ukraine.

Enduring peace can only be achieved when justice is prioritized through international rule of law. This means justice to all parties involved, and not the silencing of some of the parties while professing peace. Justice in conflict also means accountability and responsibility for violations of laws of human rights, international humanitarian law, and international criminal law. The *de jure* standard is that nobody should be immune from accountability for violating these standards—especially when the subject in issue includes crimes against humanity, genocide, and war crimes. Wars of expansion and aggression would ordinarily warrant the commencement of accountability processes, including criminal trials, truth commissions, and bodies of inquiries and collective security measures through the UN. The powerful position of Russia in the UN has rendered the UN processes unimpressive for the time being.

While it is necessary to view the war from the prism of expansionism and aggression, we must not lose sight of the economic aspects of the war, considering Ukraine's strategic position in the global food system.[185] Thus, global peace also entails designing and pursuing fair structures of economic governance that will give all people a fair chance of self-development and a dignified living. Otherwise, the economic factors of conflict will endure long after the last weapons would have been expended on the battlefield. Transitional justice processes must consider reparations for economic destruction and restoration of livelihoods at the end of the conflict. Hence the intervention in the next Section, on the need to centralize justice in the pursuit of global peace.

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[184] Ademola Adeleke, *The Politics and Diplomacy of Peacekeeping in West Africa: The Ecowas Operation in Liberia*, 33 J. MOD. AFR. STUD. 569 (1995); Erika De Wet, *The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27 LEIDEN J. INT'L L. 353 (2014); Tatiana de Almeida Freitas R. Cardoso & Rafaela Steffen G. da Rosa, *ECOWAS' Operations Under International Law: A Matter of Common Goals to Bring About Peace or a Shield for States' Self-Interests*, 2 J. GLOB. PEACE & CONFLICT 19 (2014).

[185] Mohammed Behnassi & Mahjoub El Haiba, *Implications of the Russia–Ukraine War for Global Food Security*, 6 NATURE HUM. BEHAV. 754 (2022).

A. Peace Through Justice

Although there are theories in law that seem to celebrate the rule of law and obedience to the law, even if the law has an unjust outcome, justice is indeed the surest foothold of law.[186] A law animated by the values of justice is central to peaceful co-existence. Perhaps this explains why we refer to our institutions of law as the Justice Department.[187] We refer to our *judex* by the same foundation as Justice Wendel Holmes, Chief Justice John Marshall, Justice L. Brandies, Justice Thurgood Marshall, Justice Ruth B. Ginsburg, and Justice Ketanji Brown Jackson.[188]

Hence, judicial oaths of office affirm commitment to do justice to all persons who come before the courts. In international law and the global encounter of people amongst themselves and across borders, the limited availability timely, reliable, and accessible justice-accomplishing mechanisms is a major contributor to the making of conflicts. It is also a contributor to racism in transitional justice because much of the encounter pivots around balance of power dynamics.

Arguably, global peace can only be accomplished through justice as a genuine consideration in the relationship among states. But that justice must be robust and dynamic beyond the formalist and liberal taxonomies that overlook the human condition across borders, races, creeds, cultures, and social associations. This is because the liberal and formalist creeds of justice we rehearse in international law have been unable to meet the core challenges of most of humankind.

So, we need justice, and that has to begin by retracing our steps from the famished road of an international order that racializes, excludes, dominates, fragments, excludes on economic grounds, and intervenes illegally. Transitional justice must explore these issues that create mass violence as a means towards prevention of violence. Transitional justice should not be an undertaking that always comes too late—only after the violations have happened.

Thus, we must talk about economic justice, social justice, fair trade, and the recognition and respect of the sovereign rights of others. Hence, pursuing those iterations of justice, which will also entail reparative, restorative, and redemptive justice, is crucial in our search for enduring just global peace and security. The transitional justice cannon that continually elides the interrogation of the socioeconomic concerns that inspire conflicts incentivizes impunity because winning at cost becomes the best deal.

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[186] *See generally* Samuel E. Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117 (1960).

[187] An amalgamation of these institutions of law forms the Justice System. We also debate about access to justice and not access to law.

[188] It is neither for want of diction nor lack of mental perception that we prefix these names with the term 'justice.' Rather, it is a profound acknowledgment of their duty in the law and society. It is also because we recognize the value of taxonomies and rhetoric in shaping the evolution of just societies. Our addressing of judges as 'justices' is our foretelling that they are there not as tyrannical masters but servants of justice. In those moments when these juridical persons have failed to be faithful to justice, the stream of law and justice has been polluted and often to the detriment of people and segments of society. In a sense, these failures form the pathologies of our justice systems and contribute to our current dilemmas about enduring legacies of historical (in)justice.

In conflicts such as the ongoing war in Ukraine, justice includes justice for the dead and disappeared:[189] And justice for the society as a whole, hence the imperative to find and preserve mass graves—recognizing their legal personality and as sites of just reckoning, if not now, certainly later.[190]

It is on these foundations that accountability mechanisms are hinged. Such mechanisms may include criminal trials, truth commissions, reparations, and memorialization. Only effective accountability can ensure stable peace. Often, we see situations where states engage in a choreography of transitions based on minimal political negotiations without settling the problems that led to war. This approach is an easy way to miss an opportunity to lay the foundations of enduring peace. Therefore, the sure pathway to peace is to work for justice.[191] Justice may also mean adjusting approaches that are founded on racism, and this is one area where international law has had limited success. The next Section, examines how we can destroy racism and thus enshrine a safer international order and transitional justice.

B. Destroying Racism

Global just peace in an unequal world is impossible without a deliberate effort to destroy the racialized foundations of international law. Anghie, Achuime, Carbado, and many others have explored these themes of race and the third world in extenso. That history of racialized international law has produced many humanitarian disasters, especially for the marginal groups of international law, such as Blacks, indigenous peoples, and communities of color worldwide. The temporal commitments of transitional justice have made it difficult to have a reckoning regarding these racial historical (in)justice questions.

Critical Race Theory (CRT) is a significant development in twentieth-century legal theory. Its application to international law can help to dismantle the racialized foundations of international law and improve transitional justice's ability to address questions of racial and historical injustice.

The universal and neutral principles of international law create inherent exclusion, limiting its operation individual harms. To make international law more inclusive, we need to move away from its performative objectivism and

[189] Charlotte Mohr, *Transitional Justice and the "Disappeared" of Northern Ireland: Silence, Memory, and the Construction of the Past*, 102 INT'L REV. RED CROSS 457 (2020) (reviewing LAUREN DEMPSTER, TRANSITIONAL JUSTICE AND THE "DISAPPEARED" OF NORTHERN IRELAND: SILENCE, MEMORY, AND THE CONSTRUCTION OF THE PAST (2019)).

[190] Melanie Klinkner et al., *What is Mass Grave? Why Protect Mass Graves? How to Protect Mass Graves?*, OPINIO JURIS (July 11, 2022), http://opiniojuris.org/2022/07/11/what-is-a-mass-grave-why-protect-mass-graves-how-to-protect-mass-graves/; Melanie Klinkner, *Towards Mass-Grave Protection Guidelines*, 3 HUM. REMAINS & VIOLENCE 52, 52-70.

[191] Pope Paul V1, Message: Celebration of Day of Peace (Jan. 1, 1972). In Ukraine and other wars around the world, what we have seen is more of power and the effort to annihilate and dominate. Accountability measures now and appears to be our surest foothold for restoring Ukraine and achieving peace through justice. However, we must not miss the lessons which Ukraine has revealed about racism and its inherently violent nature. *See also* Martin Luther King Jr., The Other America (Apr. 14, 1967). (Dr. King noted that "in the final analysis, racism is evil because its ultimate logic is genocide…racism is not based on some empirical generalization; it is based rather on an ontological affirmation").

approach it with a deliberate commitment to recognizing the nuances of racialized categories.

Committing to liberal taxonomies can be problematic in many ways, as they often focus on the ideal claims of international law and overlook concrete facts. They also exclude epistemologies that are not based on empiricism and legal formalism, support Westphalian nationalism.

C. Equal Treatment and the Ideal of Balance of Power

Ensuring collective just security, peace, and sustainable development require concrete efforts to guarantee equal humanity through equal treatment. Despite the inequality in the world due to states having different economic and military capacities, the main goal should be to emphasize the equality of nations, as stated in Article 2 of the United Nations Charter. Many other global instruments also emphasize the equality of all peoples, including the United Nations Convention Against Racial Discrimination.

The importance of equality is not only recognized and protected in our domestic legal systems but also in constitutional courts and written constitutions worldwide. Prioritizing equal treatment and incorporating it into our policies and governance efforts would be crucial to achieving global peace. This means holding all people and nations to the same standards, especially in times of conflict and collective use of force.

Furthermore, equal treatment must be linked to accountability, even for those who commit heinous atrocities during conflicts. A lack of accountability in international law has caused significant fragility in the system. The United Nations has failed to hold perpetrators accountable for violations, leaving victims without justice. UN peacekeeping forces have been unaccountable for their violations, as seen in the Haitian cholera outbreak.

The UN and its officials must review immunity doctrines to ensure accountability for human rights violations in peacekeeping. States contributing contingents to UN programs must be committed to accountability. While contributing countries have primary responsibility, the UN can use its good offices to hold them accountable to international human rights and operation standards. If foreign policy and international law continue to prioritize the balance of power over human dignity, the path to peace and equal treatment will remain uncertain.

Remembering that all human beings are entitled to dignity and equality, regardless of location, is crucial. Human dignity is inherent and cannot be bought or measured in financial terms. Transitional justice policies must be built on this foundation, as it is central to any meaningful search for global peace and security in an unequal world. Protecting human dignity requires removing all obstacles to its meaningful enjoyment across nations and societies. War and its atrocities often infringe on human dignity, so we must democratize economic opportunities for marginalized groups. A world prioritizing wealth accumulation over others cannot guarantee peace and security. To achieve global peace, we must pursue human dignity by combating poverty, inequality, pollution, and lack of access to education, clean water, healthcare, and shelter.

War erodes human dignity and decency. It sets aside the value and intrinsic worth of the human person. It is even worse when the war is out of the imperial expedition of powerful states: that is why the history of international law and order founded on the imperial expedition is a cartography of one human rights violation.[192] Often, the racialized other is the victim of these imperial atrocities. The several atrocities (including rape as a tool of war, genocide, crimes against humanity, starvation in war, and destruction of water resources to cause the dependents of these resources to famish and die) debase human dignity.

Yet, many are wedded to the ideologies of violence founded on racism, conquest, and other zero-sum approaches. Restoring human dignity requires a new vision of international law that centers on the human being. Transitional justice needs to explore these foundations and grow in that direction as an aspect of humanity law. This will entail restorative and reparative justice that promotes human well-being and assures inclusive prosperity and recognition of the inviolability of all people as full beings and co-equals of the earth.

It requires new epistemologies of international law and transitional justice beyond the formalist and belligerent nationalism of imperial states. It will also mean avoiding the ambivalent and diminutive 'development goals' often set out by the UN and other international organizations for the world to pursue without commensurate commitments to real changes that will facilitate the actualization of these goals. It is, thus, worthy of continuing the interrogation of these structures of international law. Global peace and security can only be enduring when international law and policy awaken to the recognition, respect, protection, and promotion of the intrinsic worth and dignity of all human beings.

Suppose we understand these values and integrate them into our encounters within and across communities, we may avoid the belligerent vocabularies of the balance of power and contentions of states in international law.[193] That will be a great pathway to peace and global justice because the balance of power foundations of international peace and security do not centralize the human condition and are also uncertain. They are also opposed to accountability and any form of transitional justice. Three readily perceptible reasons exist for this fragility of international peace and just security founded on the balance of powers.

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[192] Christopher Szabla, *Civilizing Violence: International Law and Colonial War in British Empire,1850-1900*, 25 J. HIST. INT'L L. 70 (2023) (highlighting the nature of imperial punitive expeditions and how it is entangled with human rights violations and international law); Reed L. Wadley, *Punitive Expeditions and Divine Revenge: Oral and Colonial Histories of Rebellion and Pacification in Western Borneo, 1886-1902*, 51 ETHNOHISTORY 609 (2004); Alonso Gurmendi, *Leticia & Pancho: The Alleged Historic Precedents for Unwilling or Unable in Latin America, Explored*, OPINIO JURIS (Nov. 8, 2018), http://opiniojuris.org/2018/11/08/leticia-pancho-the-alleged-historic-precedents-for-unwilling-or-unable-in-latin-america-explored-part-ii-pancho-villa/.

[193] Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555 (1979) (highlighting the history of the idea and its relationship with international law); Quincy Wright, *International Law and the Balance of Power*, 37 AM. J. INT'L L. 97 (1943); Ernst B. Haas, *The Balance of Power: Prescription, Concept, or Propaganda*, 5 WORLD POL. 442 (1953); *see generally* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2014) (highlights the theory of offensive realism because states are often uncertain of the intensions of other state); *see generally* HANS MORGENTHAU, POLITICS AMONG NATION: THE STRUGGLE FOR POWER AND PEACE (2006); Lauri Mälksoo, *The Annexation of Crimea and Balance of Power in International Law*, 30 EUR. J. INT'L L. 303 (2019).

First, the balance of power dynamic is an easy pathway to militarism in international law, and taxonomies of war on the grounds of the balance of power and imperial conquests are ubiquitous. 'Just war' and 'holy war' are known vocabularies and have been with us since Gentili, Bacon, and Grotius—with woeful consequences.[194] It is paramount that we begin to lend an ear to the voices of those who have been marginalized and discard the oppressive strategies that have caused extensive harm to humanity for centuries. The principle of power balance often stems from the notion of dominance, which does not place emphasis on equity, reverence for human rights, and integrity. Instead, it relies on methods that entail coercion and suppression.

The world's armies operate like well-oiled machines, constantly moving and adapting to different environments, whether on land, sea, air, or the internet—or, indeed, outer space.[195] Each action taken by one army impacts others, creating new scenarios of aggression and requiring constant preparedness. This relentless pursuit of power for international peace and security fuels a continuous investment in warfare strategy and methods to eliminate perceived threats. However, true transitional justice cannot exist in a world dominated by violence and militarism. Instead, we must strive for solidarity among communities and nations, or else transitional justice will become merely a tribute to imperial ambitions.[196]

The balance of power model is a commonly used framework for analyzing international relations. However, it can be criticized for neglecting the importance of human well-being. This model treats people as expendable resources in the pursuit of power, advantage, and dominance. It prioritizes the national interest over the welfare of individuals, even if that interest is being promoted by an authoritarian, fascist, or colonizing state. Moreover, the balance of power model tends to undermine accountability as it may interfere with the pursuit of national interests. Finally, this model reinforces the false belief that domination is the only way to achieve peace and prosperity. It perpetuates this myth through cultural commitments, claims of historical destiny, and a desire for power.

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[194] *See generally* Samuel Garrett Zeitlin, *Francis Bacon on Imperial and Colonial Warfare*, 83 REV. POL. 196 (2021) (highlighting the epistemic endorsement of conquest and domination in the scholarship of Bacon). Today many scholars are still excited about the "good" that empire did to the rest of the world. Yet these are not based on the voices of the subalterns. *See also* GAYATRI CHAKRAVORTY SPIVAK, CAN THE SUBALTERN SPEAK? POSTKOLONIALITÄT UND SUBALTERNE ARTIKULATION (2008); CAN THE SUBALTERN SPEAK?: REFLECTIONS ON THE HISTORY OF AN IDEA (Rosalind C. Morris ed.) (2010).

[195] Although the international law regarding the outer space is still developing many frontline states are already strategizing on its potential military uses. International law forbids non-pacific use of the outer space no matter the state involved. A non-pacific use of the outer space could also have ramifications for the environment. The outer space is also the common heritage of humankind. The subject therefore requires more scholarly inquiry and policy articulation. *See generally* Press Release, G.A., 'We Have Not Passed the Point of no Return', Disarmament Committee Told, Weighing Chance Outer Space Could Become Next Battlefield, GA/DIS/3698, (Oct. 26, 2022); Matthew T. King & Laurie R. Blank, *International Law and Security in Outer Space: Now and Tomorrow*, 113 AM. J. INT'L L. UNBOUND 125 (2019); *The Potential Human Cost of the use of Weapons in Outer Space and the Protection Afforded by International Humanitarian law: Position Paper Submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the Issues Outlined in General Assembly Resolution 75/36, 8 April 2021*, 102 INT'L REV. RED CROSS 1351 (2020).

[196] If imperial states are always unaccountable and determine when, and what situations deserve transitional justice engagement, then we have lost the capacity to guard the guardians.

Allott proposes that America has an "imperial responsibility" to offer global stability and order in order to achieve international security.[197] He asserts that this "imperial responsibility" is the United States' "historical destiny" and should be pursued with resolute determination. Allott maintains that the "Kantian Myth" is "a consoling myth" and thus insufficient to serve as an effective law in international society. It is noteworthy that a highly respected European scholar, such as Allott, would advocate for the notion of imperial responsibility and the view of other people as subjects of this responsibility. Allott does not mention any other tradition outside of the West, except for a brief reference to a "rag-bag of peoples" with "ancient traditions."[198]

However, the idea that international law and society should be founded on the folklore of a single state's "historic destiny" is problematic for several reasons.[199] First, it is precarious because it encourages imperial attitudes that disregard the fate of other individuals, and communities, who are viewed as a "*ragbag of peoples*." Such an attitude cannot promote comprehensive humanity and fair transitions because its rationale is based on exclusion and "othering." It reinforces supremacy as the norm, which is incompatible with fairness and inclusion.

Furthermore, Allott later suggests constructing multilateralism to address the issues facing humanity, which contradicts his earlier argument that pays tribute to the "historic destiny" of one state as the bearer of an imperial responsibility for all of humanity.[200] This recommendation echoes Kipling's "Whiteman's Burden" and is worrying.'[201] It rings like an afterthought or the universalism of international law, which has historically produced ambivalence and the legal transplant of European ideals across the globe regardless.

The Berlin West Africa Conference was presented as a way to promote free trade, but it actually led to the partitioning of African lands and peoples among European powers. This imperialistic mindset sees other cultures as inferior, leading to numerous violations, including current conflicts such as Russia's intervention in Ukraine. Such thinking fosters a culture of disorder and irresponsibility. If taken to its logical conclusion, it could permit nations like Russia and China to pursue their "historic destinies" and imperialistic obligations in relation to their neighbors. This is perilous and must be challenged by international legal scholars. If only some nations are allowed to conceive themselves as possessing an "imperial responsibility", then why not others? This will inevitably lead to further strife and less global stability, security, and fairness. If nations are expected to demonstrate their civilization and humanity through warfare, then true peace will forever elude us.

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197 Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOB. LEGAL STUD. 391, 391 (1998).

198 *Id.* at 392.

199 Allott, *supra* note 197, at 407.

200 See *id.* at 413 ("The great task of the coming decades is to imagine a new kind of international social system, to a new role for the United Nations in the new kind of world …to imagine at last a new kind of post-tribal international law...").

201 RUDYARD KIPLING, THE WHITEMAN'S BURDEN, (1899) (written in support of the US to take up the imperial mantle over the Philippines).

The Berlin West Africa Conference was supposed to promote free trade, but it ended up dividing African lands and peoples among European powers. This imperialistic mindset views other cultures as inferior and leads to numerous violations, such as Russia's intervention in Ukraine. This kind of thinking fosters a culture of disorder and irresponsibility, allowing nations like Russia and China to pursue their "historic destinies" and imperialistic obligations towards their neighbors. This is dangerous and must be challenged by international legal scholars. If only certain nations are allowed to see themselves as having an "imperial responsibility," why not others? This will inevitably lead to more conflict and less global stability, security, and fairness. If nations are expected to demonstrate their civilization and humanity through warfare, then true peace will always be out of reach.

Thus, it is imperative to cultivate a brand of internationalism predicated upon collective ethics, multilateral consensus, and shared humanitarian principles rather than embracing the idea of a Hobbesian Leviathan vested with untrammeled power to coercively unify disparate populations. It is salient to acknowledge that paradigms that celebrate militarism and dominion as conduits to international greatness risk ossifying into ideological cornerstones with an elevated tendency for engendering violence, as evinced by the doctrinal footings of Nazi Germany and the Rwandan genocide. Within the Rwandan context, dehumanizing rhetoric—classifying one segment of the populace as "cockroaches"—served as a precursor to orchestrated mass killings.

This particular mindset invariably sustains the status quo as an inviolable dogma, thus precluding constructive evolution in international legal structures. The inadequacy of international law in transcending this paradigm is poignantly illustrated by the conflict in Ukraine, which exposes the epistemological and scholarly limitations ingrained in the balance-of-power methodology as a vehicle for global peace and stability. Even esteemed legal scholars have occasionally capitulated to this reductive and dehumanizing narrative within international law and security, which glorifies conquest, containment, exclusion, annihilation, and extermination as the purported avenues to global harmony.

I propose a new approach to international law that prioritizes the human condition. This shift would counteract the aggressive tendencies that currently dominate international legal norms, foreign policy decisions, and the practice of transitional justice. By placing the human condition at the center of international legal frameworks, we can challenge the belief that military endeavors are the main way for states to progress.

This humanistic approach would challenge the idea that military supremacy is the ultimate measure of the success of civilizations or sovereign entities. Maintaining a geopolitical landscape that is based on the hierarchical dominance of one state over another only fuels conflict. The "us versus them" mentality fails to recognize justice as a key component of lasting peace.

Focusing on the collective human condition would require reallocating resources to address global challenges, such as social inequality, economic disparities, healthcare access, and education opportunities. This would promote prosperity and development beyond national borders, encouraging a more inclusive and universal ethos.

This proposed framework is not merely a Kantian derivative; it transcends both constitutional integration and market-oriented considerations to underscore justice as the overarching principle that should govern human interactions on the international stage.[202] It is also not a benevolent imperial order of international law. Indeed, it is not enough to rely solely on a benevolent imperial international law that involves the offering of gifts and charitable actions to colonies, vassals, or subordinated sovereigns. What is truly necessary is an international law that prioritizes humanity and actively works towards restoring it on a global scale. This requires the elimination of the factors that perpetuate apathy and racial segregation while simultaneously ensuring equal opportunities, fair treatment, and capabilities for all.

VI. Conclusion

The ongoing conflict in Ukraine is a reminder of the failure of the global community to achieve peace and equitable security. International law has often been used to perpetuate hierarchical relations between states, resulting in systemic imbalances and the audacity of powerful nations to flout legal norms without fear of reprisal. To address these issues, a reconceptualization of the approach to global peace is necessary, which entails holding all stakeholders accountable for Ukraine's current plight.

The article argues for the decolonization of the foundational structure and evolution of international law and policy, which can be achieved by adopting theoretical frameworks like Critical Race Theory and Third World Approaches to International Law. To achieve lasting peace, multilateral structures must prioritize inclusivity and equity over balance-of-power, which perpetuates discriminatory application of international law. Recognizing the impact of war on individuals, democratic processes, and mental health is essential to addressing the issues of transitional justice faced by racialized communities.

Equally, subaltern ideals of recognizing our common humanity across lands and climes can inspire new hopes of peace, global justice, accountability, and security for all peoples in an unequal world in the second decade of the 21st century and beyond.[203] Racism directly affronts our common humanity and humanity law, which transitional justice promises. Therefore, a deracialized and people-oriented approach to international law holds a better promise for peace in our world.[204]

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202 *See* IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (G. Allen & Unwin Ltd. eds., 1915).

203 These ideas are trans-civilizational as strands of them are found around the world. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, MEDITATIONS XVII (1624) ("No Man is an Island [...] the death of any man diminishes me for I am involved in Mankind").

204 In a recent message to the International law Associations Conference in Lisbon Portugal, the UN Secretary General had this to say: "international law is not only for States – it should serve people. A people-centered vision for the rule of law can ensure that institutions remain strong and accountable, and that justice and fair remedies are accessible to all." *See Secretary-General's Video Message to the 80th Biennial Conference of the International Law Association: "International law: Our Common Good"*, U.N. (June 22, 2022), https://www.un.org/sg/en/content/sg/statement/2022-06-20/

Hence, we cannot be indifferent to the plight of others or assume that we are too distant from the problems of conflict and impunity because parts of our societies are committed to the pathways of domination and violence. These are spaces where we should work to make a difference through transitional justice projects and deliberations—because there are "deaf republics" everywhere.[205]

secretary-generals-video-message-the-80th-biennial-conference-of-the-international-law-association-%E2%80%9Cinternational-law-our-common-good%E2%80%9D.

[205] Ilya Kaminsky, *We Lived Happily During the War*, *in* DEAF REPUBLIC (2019). Reflecting on the poem, the Ukrainian-American Poet, has this to say:
"The poem is meant to serve as a wakeup call; to prevent people from reading "Deaf Republic" as a tragedy elsewhere. Deaf Republics, with their hopes, protests, and complicities are everywhere. We live in the Deaf Republic."
See Dan Kois, *"The Poem is a Warning" Ilya Kaminsky on his Viral Poem, "We Lived Happily During the War" and Ukraine Resistance*, SLATE (Mar. 4, 2022), https://slate.com/culture/2022/03/interview-ilya-kaminsky-poet-ukraine.html.